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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The decisions, rulings, notices, and abstracts which are published in the CUSTOMS BULLETIN are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Logistics Management, Printing and Distribution Branch, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 92–30)

APPROVAL OF SGS HAWAII, INC., AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of approval of SGS Hawaii, Inc., as a commercial gauger.

SUMMARY: SGS Hawaii, Inc., of Aiea, Hawaii recently applied to Customs for approval to gauge imported petroleum, petroleum products, organic chemicals and vegetable and animal oils under Part 151.13 of the Customs Regulations (19 CFR 151.13). Customs has determined that SGS Hawaii Inc., meets all of the requirements for approval as a commercial gauger.

Therefore, in accordance with Part 151.13(f) of the Customs Regulations, SGS Hawaii Inc., is approved to gauge the products named above in all Customs districts.

EFFECTIVE DATE: March 19, 1992.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, 1301 Constitution Avenue NW, Washington, D.C. 20229 (202–566–2446).

Dated: March 26, 1992.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, March 31, 1992 (57 FR 10947)]

19 CFR Parts 141 and 151

(T.D. 92–31)

TECHNICAL CORRECTIONS TO THE CUSTOMS REGULATIONS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: In accordance with Customs policy of periodically reviewing its regulations to ensure that they are current and accurate, this document makes two technical corrections to the Customs Regulations. The changes are nonsubstantive.

EFFECTIVE DATE: April 1, 1992.

FOR FURTHER INFORMATION CONTACT: Harold M. Singer, Regulations and Disclosure Law Branch (202) 566–8237.

SUPPLEMENTARY INFORMATION:

BACKGROUND

As part of a continuing program to keep its regulations current and accurate, Customs has determined that certain changes should be made to the regulations. In this document, Customs is making two technical corrections to the regulations that are nonsubstantive.

The first correction involves § 151.12, Customs Regulations (19 CFR 151.12). Section 151.12 provides that procedures for sampling and testing of benzenoid chemicals and products are set forth in Subpart D of Part 152 of the Customs Regulations. Subpart D concerned American selling price, which was eliminated by the Trade Agreements Act of 1979. When Subpart D of Part 152 was removed from the Customs Regulations by Treasury Decision 87–89, which was published in the Federal Register (52 FR 24444) on July 1, 1987, the cross-reference to Subpart D also should have been removed. This document now removes § 151.12.

The second correction involves the heading of § 141.102. When a document amending § 141.102 was published in the Federal Register (54 FR 28412) as Treasury Decision 89–65 on July 6, 1989, a new heading for § 141.102 was also published. However, the document, inadvertently, did not use amendatory language so that the heading of the section would be amended in the Code of Federal Regulations (CFR). Accordingly, the correct title of § 141.102 – When deposit of estimated duties, estimated taxes, or both, not required – does not appear in 19 CFR. This document corrects that error.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Inasmuch as these amendments merely correct two previously published documents, the effects of the amendments are nonsubstantive in nature, and the amendments merely conform the Customs Regulations

to agency practice, pursuant to 5 U.S.C. 553 (a)(2) and (b)(B), notice and public procedures are not required and would be contrary to the public interest. For the same reasons, pursuant to 5 U.S.C. 553(a)(2) and (d)(3), a delayed effective date is not required.

EXECUTIVE ORDER 12291 AND REGULATORY FLEXIBILITY ACT

Because this document relates to agency management, it is not subject to Executive Order 12291. Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

LIST OF SUBJECTS

Part 141

Customs duties and inspection, Explosives, Imports, Lawyers

Part 151

Chemicals, Customs duties and inspection, Imports

AMENDMENTS TO THE REGULATIONS

Parts 141 and 151, Customs Regulations (19 CFR Parts 141 and 151) are amended as set forth below:

PART 141 – ENTRY OF MERCHANDISE

1. The general and relevant specific authority citation for Part 141 continues to read as follows:

Authority: 19 U.S.C. 66, 1448, 1484, 1624.

* * * * * * *

Subpart G also issued under 19 U.S.C. 1505.

* * * * * * *

2. The heading of § 141.102 is revised to read as follows:

§ 141.102 When deposit of estimated duties, estimated taxes, or both not required.

* * * * * * *

PART 151 – EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. The general authority citation for Part 151 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 8 and 9, Harmonized Tariff Schedule of the United States), 1624.

* * * * * * *

2. Section 151.12 is removed and reserved.

Dated: March 26, 1992.

KATHRYN C. PETERSON,
Chief,
Regulations and Disclosure Law Branch.

[Published in the Federal Register, April 1, 1992 (57 FR 10988)]

(T.D. 92–32)

TARIFF CLASSIFICATION OF PROTECTIVE FOOTWEAR

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interpretative rule relating to the tariff classification of imported protective footwear.

SUMMARY: This document sets forth: (1) Customs position regarding the scope of the phrase "footwear designed to be worn over or in lieu of other footwear as a protection against water, oil, grease, or chemicals or cold or inclement weather," and (2) suggested criteria for determining whether certain types of footwear serving dual purposes can be considered protective for tariff purposes.

EFFECTIVE DATE: July 14, 1992.

FOR FURTHER INFORMATION CONTACT: Donald F. Cahill, Commercial Rulings Division, U.S. Customs Service, 1301 Constitution Ave., NW., Washington, D.C. 20229, (202) 566–8181.

BACKGROUND

By notice published in the CUSTOMS BULLETIN on August 21, 1991 (25 Cust. Bull. 15), Customs solicited public comments as to whether criteria can be developed for determining whether certain types of footwear serving dual purposes can be considered protective for tariff purposes. Also, comments were requested regarding the scope of the phrase in subheading 6404.19.20, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), "footwear designed to be worn over or in lieu of other footwear as a protection against water, oil, grease, or chemicals or cold or inclement weather." Pursuant to a request to extend the period of time for submission of comments, Customs published a notice in the CUSTOMS BULLETIN on November 6, 1991 (25 Cust. Bull. 13), extending the period of time to November 20, 1991. A summary of these comments and Customs analysis thereof follows:

ANALYSIS OF COMMENTS

Interpretative Rule Relating to Tariff Classification of Imported Protective Footwear:

Customs is reviewing its position with respect to the tariff classification of imported footwear having "protective qualities." Before making any determination, comments from the public regarding the scope of the Chapter 64, HTSUSA, phrase "footwear designed to be worn over or in lieu of other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather" were requested.

Only four of the fifteen comments received contain substantive legal arguments. Three were on behalf of importers of so-called dual purpose footwear (footwear which performs a comfort or fashion function as well

as a protective or waterproof purpose) while one comment was submitted on behalf of domestic producers of this type of footwear.

Eleven comments were general in nature and contained virtually no substantive legal arguments. Eight of these expressed opposition to classifying dual purpose footwear with "protective" qualities as protective footwear. Three were in favor of classifying this type of footwear as "protective" footwear.

General comments supporting the importers position are summarized as follows:

1. The increase in duty on cold weather boots from 10.5% to 37.5% is unfair to the American consumer who will bear the burden dollar-wise.
2. The retail cost of a boot with an F.O.B. cost of $10 per pair will be increased by approximately $15, if the boots are considered protective.
3. Shoes made in the U.S. are overpriced and are not comparable in quality to what is available in the open market.
4. There is really no domestic footwear industry to protect. What manufacturing exists cannot meet 5% of the market demand.
5. There appears to be need for a Congressional review to lower the duty on imports of rubber footwear and lessen the burden on the U.S. consumer.
6. Footwear with nylon and leather uppers and GORE-TEX linings are not replacing rubberized footwear. They are an entirely different type of footwear.
7. If boots lined with GORE-TEX are reclassified as protective footwear, it will cause a dramatic decline in sales thus effecting the economy of the state of Maryland (where GORE-TEX is made) and also the U.S. economy.
8. Certain rubber and PVC riding boots which are not principally used as protective footwear were erroneously classified as such by Customs.
9. With regard to winter-proof qualities and protection against inclement weather, all winter sport shoes try to incorporate these qualities as much as possible. With the use of polyurethane as the principal outer material, footwear becomes almost 100% waterproof. Without adequate insulation to protect against the elements, footwear would not be usable in cold weather.

General comments supporting the domestic producers' position are summarized as follows:

1. Gore has spent millions of dollars in R&D developing the most waterproof lining material known to man. Also, they have spent millions advertising this message.
2. GORE-TEX is synonymous with waterproof material.
3. GORE-TEX lined hiking boots are marketed as protective and should be dutiable at 37.5%.

SUMMARY OF SUBSTANTIVE COMMENTS FOR IMPORTERS OF DUAL PURPOSE FOOTWEAR

History – Draft Conversion of TSUS to HTS:

Under the Tariff Schedules of the United States (TSUS) the type of footwear at issue here, footwear with textile/leather uppers and rubber/plastic outer soles, was excluded from classification as protective footwear when the leather portion represented more than one-half of the exterior surface area of the upper and was classified according to its component material of chief value. The applicable duty rates were 8.5% and 10%, depending on gender of the wearer, when the component material of chief value was leather, and 12.5% when the component material of chief value was rubber or plastics. Under no circumstances was footwear of this nature subject to the higher 37.5% rate of duty applicable to protective footwear.

One of the major changes that occurred as a result of the conversion from the TSUS to the Harmonized Tariff Schedules (HTS) was the elimination of accessories and reinforcements in determining upper material. This change was of concern to importers of the footwear at issue here. Early drafts of the HTS carried over the non-protective duty rate for this type of footwear only when the footwear was sports footwear. Importers feared that hiking boots would not be considered sports footwear and, therefore would be assessed duty at the protective rate. Subsequent drafts applied the lower rate to all such footwear.

Eventually, as a result of discussion among the responsible agencies of the U.S. Government, including the Customs Service, and representatives of importers and domestic industry, the reference to component material of chief value was eliminated in favor of a unitary 10.5% rate of duty applicable to all such footwear regardless of the component material of chief value or of gender. This approach was extended to footwear other than sports footwear. It was the understanding of retailers and importers that this rate of duty would apply to all such footwear, the only requirement being that the uppers be more than one-half leather.

In a letter dated April 22, 1983, addressed to the International Trade Commission, the Volume Footwear Retailers of America, the predecessor of Footwear Distributors and Retailers of America, pointed out that the lower rate of duty for this type of footwear with respect to Chapter 64 in the draft conversion of the TSUS to the HTS applied only to sports footwear and athletic footwear. Concerned that footwear such as that in issue would be subject to a higher rate of duty because of the conversion to the HTS, it was requested that the lower rate of duty be extended to cover footwear other than sports and athletic footwear. The final version of the HTS adopted this request and extended the lower duty rate of all footwear having textile uppers with leather overlays. Subheadings 6404.11.20 and 6404.19.15 were crafted carefully to extend to the HTS the same treatment for this type footwear that had been applied under the TSUS.

Legislative History:

Implementation of the HTS was not intended to, and in fact did not, change the scope of the TSUS "protective footwear" provisions. While the U.S. adherence to the 6-digit international nomenclature resulted in protective footwear being classified in several 8-digit subheadings, the operative language of these subheadings remained unchanged–"designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather" and the duty rate of this class of goods–regardless of its classification–remained at 37.5%. Thus, subheading 6404.19.20, HTS, should be construed in accordance with its legislative history which was intended to protect American producers of rubber protective footwear: that is, rubbers and galoshes and "footwear designed for a particular commercial or industrial use, such as fishing, fire-fighting, chemical manufacturing and dairies." Footwear which is designed to be worn by the general population for recreational purposes does not compete with protective footwear manufactured by the American rubber footwear industry, and was not intended to be subjected to a 37.5% rate of duty.

Relative Specificity:

Headquarters Ruling Letter (HRL) 086993 dated June 12, 1990, issued to Kodiak USA, determined that the provision for protective footwear, HTS subheading 6404.19.20, is more specific than HTS subheading 6404.19.15 under GRI 3(a), which provides that when goods are described by two or more headings, classification is to be in the heading which provides the most specific description. The rationale for this position was that the provision for protective footwear is a use provision and use provisions are more specific than a physical description of merchandise.

Classification in Chapter 64 of the HTS is governed principally by two considerations, the materials of the upper and the materials of the outer sole. Chapter Note 4(a) defines the material of the upper to exclude accessories and reinforcements. Classification in subheading 6404.19.15, on the other hand, carves out an exception to the general rule and requires consideration of leather accessories and reinforcements in determining the material of the upper.

Under the doctrine of relative specificity, imported merchandise is classified in the tariff provision having requirements which are the more difficult to satisfy. The provision for protective footwear encompasses all footwear with textile uppers which protect against water, oil, grease, chemicals, cold or inclement weather. This is a very broad provision and one which covers a wide variety of footwear with a wide variety of uses. The only requirement is that footwear protect against one of six hazards. Subheading 6404.19.15, on the other hand, does not describe all footwear with textile uppers. It is limited to footwear with textile uppers having leather accessories and reinforcements which cover one-half of the external surface area of the upper. This provision was designed to have limited coverage. It was designed specifically to carry

over to the HTS the lower duty rate of a narrow class of footwear which, because of a change in the manner of ascertaining the materials of the upper, are classified as having textile uppers. This is the narrower provision and the one which, in the context of Chapter 64, has requirements which are more difficult to satisfy.

As noted above, subheading 6404.19.15 is an exception to the general rule. For this reason it must be considered more specific. Provisions which are invasive in character are, by definition, more specific. *Upton, Brandeen & James, Inc. v. United States*, 56 Cust. Ct. 92, C.D. 2616 (1966). Subheading 6404.19.15 is not invasive in the same sense as the provision in *Upton, Brandeen & James, Inc.* Nevertheless, it does create an exception to the general rule and in that sense is invasive. As such, it is the more specific provision.

Primarily Designed:

There is no special language which defeats the application of Additional U.S. Rule of Interpretation 1(a) in determining the scope of subheading 6404.19.20. Indeed, the legal notes to Chapter 64 support the application of principal use to this provision. Additional U.S. Note 3 to Chapter 64 specifically provides that "waterproof footwear" within heading 6401 encompasses footwear designed to protect against penetration by water, or other liquids, *whether or not primarily designed for that purpose*. Thus, when Congress intended that footwear designed to protect against water or liquids be classified according to that characteristic, *even when* it was principally designed to be used for other than waterproof footwear, it clearly made that intent known. The failure of Congress to similarly provide such language to expand the coverage of subheading 6404.19.20 is clear evidence of its intention that the principal use concept was to be applied to this provision.

Designed to be Protective:

The terms of subheading 6404.19.20 require that the footwear covered by this provision must be designed to be worn as a protection against water, oil, grease or chemicals or cold or inclement weather. There is no doubt that the hiking boots with GORE-TEX inserts are not peculiarly and specifically fitted for use as protective footwear. For an article to be "designed" for a particular purpose it must be peculiarly and specifically fitted for that use.

The subject footwear is not protective. It provides protection against water and in some cases cold and inclement weather. However, this footwear is not designed to be worn over or, *in lieu of*, other footwear. First, hiking boots are not worn over other footwear. Also, hiking boots are not worn *in lieu of* other footwear. The provision for protective footwear is limited to that class of footwear which is intended solely for wear in inclement weather. It does not provide for footwear worn for ordinary purposes. It is specifically limited to that footwear which is worn *in lieu of* other footwear.

The subject footwear is not designed to be worn primarily in wet weather. It is designed to be worn for hiking purposes, principally in fair weather. As an added feature, recognizing that as in all outdoor activities, weather plays a part, the footwear has features which provide a degree of protection from inclement weather. However, this footwear is not designed to be worn *in lieu of* other footwear. Consumers do not buy two pairs of hiking boots, one for dry weather and another for inclement weather.

Principal Use:

If use is a criterion to be examined in ascertaining whether a particular boot is within the purview of the protective footwear provision, then only footwear designed to be principally used for this purpose is a subheading 6404.19.20 article. Principal use is that use which exceeds any other single use.

To meet the principal use criterion one use must predominate. If a hiking boot with a GORE-TEX insert was *equally* used as protective footwear and for hiking, then it could not be principally used as protective footwear, as required by 6404.19.20, and would be classified in the less specific physical description provision, 6404.19.15.

Footwear with a GORE-TEX insert can be classified in subheading 6404.19.20, HTS, *only* if it is primarily worn in wet or cold weather, or in wet or cold areas for protection against these elements.

Role of GORE-TEX in Hiking Boots:

While all hiking boots must have the ability to provide protection against water penetration as an aid to the comfort of the hiker, it is totally inappropriate to elevate the water repellant function of the GORE-TEX insert over the other design features which must be present to create a hiking boot. In reality, the protective feature provided by the GORE-TEX insert is no more than a secondary or ancillary function of the hiking boot. Therefore, while the GORE-TEX insert does create a superior hiking boot, it is not a subheading 6404.19.20 article because it is not designed to be primarily worn as a protection against water, cold or inclement weather, and certainly is not directly competitive with protective rubber footwear. Had Congress intended another result, it would have specifically expanded the scope of this provision as it did with heading 6401 and stated that the provisions for footwear designed to be worn over, or in lieu of other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather includes such footwear whether or not it is primarily designed for such purposes. Absent such legislative instruction, when footwear has a principal design function which establishes its use, a secondary or ancillary function is irrelevant for classification purposes.

A GORE-TEX insert does not create the article but merely enhances its ability to function for its intended purpose. See T.D. 91–78 wherein Customs found that the presence of GORE-TEX linings and interlinings in garments to provide a barrier against wind and outside moisture and

allow the wicking of water vapor away from the body, did not impart the significant character to that garment. This conclusion was reached as a result of its finding that while the presence of GORE-TEX may make a "coat more suitable for use in inclement weather." It does not define what the article is and how it should be classified. While we disagree with the conclusion in T.D. 91–78, it is clear Customs cannot have it both ways. If the presence of GORE-TEX in a coat is merely considered a component which permits the article to perform its designed function in a superior fashion, then the presence of the GORE-TEX insert in a hiking boot does not convert it into protective footwear.

Linings:

The fact that GORE-TEX is used in a lining would seem irrelevant in view of General Explanatory Note (D) to Chapter 64, which states in part that "[t]he constituent material of any lining has no effect on classification."

Advertising:

Advertising claims are largely irrelevant. Either the footwear is "designed" for protective purposes or it is not. At best, advertising claims are nothing more than some evidence of design characteristics but they are hardly dispositive of the legal question inherent in classification decisions.

Sports Footwear:

Hiking/Backpacking boots with a GORE-TEX insert are either sports footwear or athletic footwear other than sports footwear within subheading 6404.11. These boots meet the definition of "Sports Footwear" for tariff purposes for the following reasons:

1. Hiking/backpacking is a sporting activity;
2. the boots are designed for hiking/backpacking which is a sporting activity; and
3. have spikes, springs, cleats, stops, clips, bars or the like.

Athletic Footwear:

If the hiking boots are not classifiable as sports footwear in subheading 6404.11, they are clearly athletic footwear within that provision. To be classified as athletic footwear, it is not necessary that the footwear be worn exclusively in athletic activity. U.S. Note 2 to Chapter 64 makes it quite clear that athletic footwear can be used for other than athletic purposes. It is sufficient that the footwear possess attributes which indicate their suitability for a sporting activity.

Special Criteria:

Customs should not be concerned with attempting to develop special criteria for the classification of footwear containing a water-repellent, breathable insert when normal rules of tariff classification will permit it to make such a determination. By examining the shoe and the prime function which it is employed for, Customs will easily be able to distin-

guish between footwear which is primarily designed to be used for protection purposes and those articles which contain a measure of protection as a secondary feature.

SUMMARY OF SUBSTANTIVE COMMENTS FOR DOMESTIC PRODUCERS OF DUAL PURPOSE FOOTWEAR

History – Background:

The so-called "protective footwear provision" appears in several subheadings in Chapter 64, HTS, and formerly appeared in several items of the TSUS. Historically, this provision was relatively easily applied because, under the original TSUS, it applied primarily to footwear almost entirely of molded rubber or plastic construction, which, because of its material and construction was limited with regard to comfort and style and was generally considered unfashionable. This lack of comfort and style, formerly inherent in protective footwear, simplified application of the protective provisions found in the early TSUS because it rendered footwear designed for protective purposes and footwear designed for fashion, style and comfort to be mutually exclusive. *See, e.g., Stylo Matchmakers International Inc. v. United States*, 73 Cust. Ct. 78, C.D. 4556 (1974), involving injection molded golf shoes.

Expanded Coverage of Protective Provision:

The applicability of the protective provision to various types of non-waterproof and non-molded rubber or plastic styles and types of footwear in heading 6402 and to textile upper rubber or plastic soled footwear in subheading 6404.19.20 has resulted in expanding the footwear subject to such classification. The advent of new materials and new techniques has made it easier than ever before for footwear with textile uppers or with stitched plastic or rubber uppers to be considered "protective footwear" for tariff purposes. These relatively newer materials and techniques for adding "waterproof" qualities to footwear include: coating the exterior or interior of textile uppers with polyurethane or other waterproof or water resistant materials; sealing the seams of footwear having stitched rubber or plastic uppers; tanning the leather of uppers so as to render it waterproof or water-repellent; treating the interior or exterior of textile or of textile and leather upper footwear with materials that protect against chemicals or cold weather; using pile or other materials that serve to protect against cold as linings or liners for textile uppers, textile and leather uppers, leather uppers, and stitched rubber or plastic upper footwear; and using materials such as GORE-TEX as seamless linings or booties in textile uppers, stitched rubber or plastic uppers, or leather upper footwear.

The use of any of the foregoing techniques in the manufacture of footwear with textile uppers, textile uppers with leather accessories or reinforcements, or stitched rubber or plastic uppers should often directly affect the classification of such footwear by satisfying one of the provisions for protective footwear in heading 6402 or 6404.

Relative Specificity:

According to HRL 086993 dated June 12, 1990, issued to Kodiak USA, footwear that is *prima facie* classifiable under both subheadings 6404.19.15 and 6404.19.20 is more specifically described under subheading 6404.19.20 because that subheading is a "use provision" which is considered to be more specific than the "physical description" under subheading 6404.19.15. However, it should be noted that even if subheading 6404.19.20 was not considered more specific but was instead considered equal to subheading 6404.19.15 then, pursuant to GRI 3 (c), the footwear would nevertheless be classified under 6404.19.20 as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

Congressional Intent:

Application of the protective provisions has been consistently expanded to include new materials. The language "footwear designed to be worn over, or in lieu of other footwear as a protection against water, oil, grease, or chemicals or cold or inclement weather," was first used only in item 700.50 of the original TSUS enacted in 1963, where it applied to footwear "over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics," *which also had* "soles and uppers of which over 90 percent of the exterior surface area is rubber or plastics" and was subject to American Selling Price (ASP) only if more than 50 percent by weight of *natural* rubber.

The application of the provision was extended in 1965. At that time item 700.50 was broken down into 700.51, 700.52 and 700.53, to all of which the protective provision continued to apply whether of natural or synthetic rubber or plastic. In 1981 the former "Other" item 700.60, to which the protective provision had not formerly applied, was broken down into 700.57 through item 700.71. Within that group the protective provision was inserted as new item 700.57, still applying to footwear "over 50 percent by weight of rubber or plastics or over 50 percent by weight of fibers and rubber or plastics," but which had an upper of which less than 90 percent of the exterior surface areas was rubber or plastics. In item 700.57, the protective provision was no longer limited only to footwear having uppers, the exterior surface area of which was required to be 90 percent or more of rubber or plastics. Thus, by enacting item 700.57 in 1981, Congress expanded the application of the provision far beyond the former 90 percent exterior rubber or plastics group of footwear to the much broader category of rubber or plastics soled footwear having uppers of various materials such as fibers, provided that less than 50 percent of the exterior surface area was of leather, and less than 90 percent of the exterior surface area was of rubber or plastics, and combinations of such materials.

In 1989, when the HTSUSA replaced the TSUS, the new schedule included the same protective provision in eleven places in headings 6401, 6402, 6404 and 6406. In doing so, the HTSUSA expanded its application

further to classifications within such headings as 6404, wherein lies the subheading at issue, which is applicable to footwear with textile uppers.

It has been argued that the legislative history of the protective provisions, prior to the TSUS, limits their application to rubbers, galoshes and footwear designed for specialized commercial or industrial use. To the limited extent that the protective provisions have their original roots in the 1933 Presidential Proclamation, which made certain footwear duties subject to assessment on the basis of ASP, it should first be noted that this assessment applied to a broad range of footwear including those with uppers in chief value of wool, cotton, ramie, animal hair, fiber, rayon or other synthetic textile, silk or substitutes and soles in chief value of rubber, or other footwear in chief value of rubber. Additionally, as technology provided new materials, the protective footwear provisions have been repeatedly broadened so as to incorporate them. In 1965 ASP assessment was partially eliminated and the protective footwear provision was first extended to include synthetic as well as natural rubber. The protective footwear provisions found in the TSUS were also then extended to apply to plastic as well as natural and synthetic rubber upper footwear. Thereafter, in 1981, ASP was completely eliminated and the protective provision was extended to textile uppers, whether natural or man-made in item 700.57. Under HTSUSA, the protective provisions of subheading 6404.19.20 were further extended so as to also apply to textile upper footwear having uppers which are over 50% external surface area of leather, when including the leather accessories or reinforcements mentioned in note 4(a) to Chapter 64.

GORE-TEX is an innovation which has led to a significant increase in the design of so-called dual purpose footwear containing this uniquely waterproof feature. As a consequence of this increase, interpretation of the protective provisions of Chapter 64 to exclude such dual purpose footwear would effectively eliminate these categories which Congress made distinct and prevalent by inserting this provision into Chapter 64 in no less than eleven different places.

Designed to be Protective:

A claim can be made regarding almost any footwear designed for protective purposes to the effect that such footwear is designed for other, perhaps even more significant, purposes since all shoes are designed for multiple purposes including comfort, support, fashion or appearance, sturdiness and/or wearability, as well as specific purposes depending upon whether the footwear is designed for such activities as horseback riding, golf, dancing, hiking, backpacking, walking, boating, dress wear, and on and on *ad infinitum*. The significant point is that none of these many other possible design criteria are set forth as classification provisions in the HTSUSA whereas, in headings 6401, 6402, 6404, and 6406, the HTSUSA contains specific provisions for "protective footwear" as footwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather.

The lesson to be learned is that any footwear, which is designed for one or more of the stated purposes and which otherwise satisfies the criteria for such "protective classification provision," is covered by such provision regardless of what other non-specially provided for purposes the particular shoe may also be designed for. The principal has been clearly enunciated in two judicial decisions which involved articles which were either "specially designed for" or "specially constructed for" a particular purpose. In *David E. Porter v. United States*, 76 Cust. Ct. 97 at 106, C.D. 4641 (1976), the Court found that since Motocross Gloves were specially designed for use in the sport of Motocross, they are classifiable as "gloves * * * specially designed for use in sports" even though they were not used exclusively for the sport of Motocross. In so finding, Judge Re also cited with approval the decision of the Court of Customs and Patent Appeals in *Plus Computing Machines, Inc. v. United States,* 44 CCPA 160 at 167, C.A.D. 655 (1957) to the effect that "[t]he purpose in question need not be the sole one served by the article and may not even be the principal one." In its decision the CCPA further stated that "[i]n ordinary usage the statement that an article is specially constructed for a particular purpose means merely that it includes particular features which adapt it for that purpose."

Principally Designed:

Contrary to the importers claim, where the drafters of the HTSUSA intended a provision to cover articles only if such articles are "principally designed" for a stated purpose they expressly set forth just such a provision. An example illustrating how the drafters expressed their intent by setting forth just such a provision is found in heading 8703 where the HTSUSA provides for "* * * motor vehicles *principally* designed for the transport of persons * * *." (emphasis added). In Chapter 87, Note 3, the HTSUSA defined "public transport type passenger vehicles" as "vehicles designed for the transport of ten persons or more [including the driver]." Obviously the provision is intended to cover such vehicles without regard to whether they are principally, chiefly, or primarily used to carry ten or more persons. The provision clearly includes vehicles designed for the purpose of transporting ten or more persons even if such vehicles are principally used to carry less than ten persons. As in the *Plus Computing Machines Inc.*, case, the "designed for" provision "* * * means that it includes particular features which adapt it for that purpose."

Role of GORE-TEX in Hiking Boots:

In the case of the instant footwear, improved breathability or ventilation can be provided by linings such as Cambrelle, Tricot, or other fabrics which are neither waterproof nor water-repellent. Footwear with such alternative, non-protective linings or booties is equally or even more comfortable than is footwear which has a dual purpose lining or bootie such as GORE-TEX (which provides breathability or ventilation while simultaneously providing a waterproof or water-repellent or cold

protective barrier). However, the uniqueness offered by the dual purpose lining or bootie, such as GORE-TEX, is found in the fact that it provides the footwear with its waterproof, water-repellent, or cold protective characteristic. Any lining material provides greater or lesser degrees of breathability or ventilation just as does the type of sock or stocking worn by the footwear user. However, only the significantly more expensive, dual purpose lining or bootie, such as GORE-TEX, provides the purchaser with the additional feature of waterproofing, water repellency, or protection against cold or inclement weather.

This design feature which is specifically provided for in subheading 6404.19.20, distinguishes the GORE-TEX lined footwear which is designed as a protection against water, oil, grease or chemicals or cold or inclement weather from the non-GORE-TEX lined and therefore non-protective footwear. All other things being equal, the same footwear lined with GORE-TEX is distinguished from the otherwise identical non-GORE-TEX lined footwear by the very design feature which permits the GORE-TEX lined footwear to be worn in lieu of other footwear for protective purposes.

In this case the instant footwear's improved breathability or ventilation can be provided by non-waterproof linings, liners, or booties. Footwear with such alternative non-waterproof non-water repellent linings or booties are equally or more comfortable as is footwear with a waterproof or otherwise "protective" lining such as GORE-TEX. However, the uniqueness offered by GORE-TEX is the fact that it provides the footwear with its waterproof characteristic. One who purchases the GORE-TEX lined footwear acquires an additional feature, to wit, the footwear's protective design characteristics. This design feature clearly distinguishes the water protective or water-repellent GORE-TEX lined footwear and, "cannot be characterized as incidental."

Significance of "in lieu of":

When dual purpose footwear is chosen in place of a breathable and comfortable but non-waterproof product, such as hiking footwear which lacks some feature, such as a GORE-TEX lining, which makes it waterproof, it is being chosen "in lieu of" other footwear for its protective design. The next step of course, is to find that such footwear, therefore, falls squarely within the protective provision. When dual purpose footwear is chosen in place of waterproof but not-breathable products, such as plastic golf shoes, it is being chosen in lieu of other footwear for comfort and fashion. An incorrect assumption, however, is that the next step is to make the converse finding. Here the footwear is chosen in lieu of other footwear, already in the protective category, because it happens to offer preferable features not connected with the protection. There is no basis to conclude that when one protective product is chosen over a similarly protective product, because of non-protective features, the former should therefore be removed from the protective category of footwear designed for a protective purpose.

Advertising:

The attributes of a product which are promoted or otherwise discussed in its marketing are often considered by the courts in determining tariff classification. It has been argued that emphasis in marketing protective features should be irrelevant because footwear may not in fact possess the features claimed by advertisements. In the first place, parties should be estopped or at the least prevented from claiming that their own fraud or inaccuracy in advertising ought to render such statements irrelevant whenever the advertisements happen to be adverse to their cause.

Second, the argument is conceptually flawed. The protective provision does not apply to footwear providing protection; it applies to "footwear designed to" provide protection. Actual protection which a product may provide, like advertising emphasis, is merely *evidence* of the use for which the product was designed. In the case of GORE-TEX lined footwear which leaks as a result of sub-standard manufacture or other defects, such fact is merely evidence that the footwear was designed to protect against water or cold or inclement weather. The fact that the footwear allegedly or actually leaks, notwithstanding the purpose of its design, does not take away from the fact that the footwear was designed to be worn in lieu of other footwear as a protection against water or cold or inclement weather.

POSITION OF THE CUSTOMS SERVICE

Sports Footwear:

The hiking/backpacking boot involved measures approximately 7 1/2 inches high (over the ankle) and has a CORDURA nylon upper with leather accessories and a rubber sole. It also has a GORE-TEX inner lining. There is a front lace closure with metal D-rings and speed hooks. The outsole is comprised of thick molded rubber with molded studs. The studs are approximately 1/2 inch high and in varying lengths, all under 1 inch.

It is claimed that this hiking/backpacking boot is properly classifiable under subheading 6404.11.20, HTSUSA, as footwear with outer soles of rubber, plastics, leather or composition leather and uppers of textile materials, sports footwear, having uppers of which over 50 percent of the external surface area (including any leather accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is leather. The applicable rate of duty for this provision is 10.5 percent *ad valorem*.

Subheading Note 1 to Chapter 64, HTSUSA, states that "[f]or the purposes of subheadings 6402.11, 6402.19, 6403.11, 6403.19, and 6404.11, the expression '*sports footwear*' applies only to footwear which is designed for a sporting activity and has, or has provision for the attachment of spikes, sprigs, cleats, stops, clips, bars or the like."

The importers assert that the hiking/backpacking boot qualifies under this Note as "sports footwear" because of the presence of lugs on the outer sole of the boot. Specifically, these lugs are "like" articles to cleats

in that they provide traction and prevent slipping. They are the modern day equivalent of cleats.

We do not agree that a lug is "like" a cleat. It is not as sharp or as pointed as a cleat. Further, the spikes, cleats, etc., that are named in the Note would be worn when engaging in a sport which involves sharp turns of the body for which the foot needs to be dug solidly into the ground.

We agree that the studs provide traction which would make walking easier on inclines or on rough terrain, but the sole of the boot is basically a normal sole that can be used for everyday walking. Basketball shoes also have specially designed soles that provide traction and allow the player to move in different directions, pivot, and jump; however, they are not classifiable as "sports footwear." Likewise, many jogging shoes and work boots have lugs, but they are not sports footwear either.

It is our position that the boot does not qualify for classification under subheading 6404.11.20 as "sports footwear." It has been our practice to interpret the term "sports footwear" narrowly. Specifically, the first requirement is that only that footwear which is designed for exclusive use in a specific sport and which cannot be used for other purposes may be considered "sports footwear". There is no doubt that the boot involved can be used for everyday walking.

Athletic Footwear:

The importers claim that if the hiking/backpacking boot is not classifiable as sports footwear under subheading 6404.11, HTSUSA, it is classifiable as athletic footwear within that provision.

Additional U.S. Note 2 to Chapter 64, HTSUSA, reads as follows:

> 2. For the purposes of this chapter, the term '*tennis shoes, basketball shoes, gym shoes, training shoes and the like*" covers athletic footwear other than sports footwear (as defined in subheading note 1 above), whether or not principally used for such athletic games or purposes.

The importers assert that the hiking/backpacking boot is clearly athletic footwear within subheading 6404.11, noting that U.S. Note 2 to Chapter 64 provides that athletic footwear can be used for other than athletic purposes. Further, it is sufficient that the footwear possess attributes which indicate their suitability for a sporting activity. They state that Customs employed this rationale in HRL 087459 dated October 2, 1990, for holding that the "Alpine" model snowboard boot was classifiable as "sports" or athletic footwear included in subheading 6404.11.90, HTSUSA.

The result reached in HRL 087459 is being reconsidered because it no longer reflects the position of Customs with respect to whether the "Alpine" model snowboard boot is "sports" or athletic footwear for tariff purposes. The first issue involved in this reconsideration is whether subheading note 1 to chapter 64 should be interpreted narrowly? The second issue is whether the snowboard boots are "like" the exemplars of athletic footwear (tennis shoes, etc) listed above?

In this instance the hiking/backpacking boot, although used in the sport of backpacking, fails to qualify as athletic footwear within subheading 6404.11 because it is not "like" tennis shoes, basketball shoes, gym shoes, and training shoes. Specifically, hiking boots are heavier than the listed exemplars of athletic footwear. This slows the wearer's running speed substantially. All the exemplars are used in sports which require fast footwork or extensive running. Additionally, the exemplars are not constructed so as to protect the foot against rough and rocky terrain as are hiking boots. For these reasons we conclude that the hiking/backpacking boot is not classifiable under subheading 6404.11, as claimed.

Linings:

General Explanatory Note (D) to Chapter 64 provides in part that "[t]he constituent material of any lining has no effect on classification."

At the international level (six digit) the presence of GORE-TEX in linings would have no effect on the classification of hiking boots with GORE-TEX linings since only the external surface of the upper is a factor in the six digit classification. However, at the national level (eight digit) linings do impact on the classification of footwear. For example, subheading 6401.92.60, HTSUSA, reads as follows:

Other:

> Having soles and uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is polyvinyl chloride, whether or not supported or *lined* with polyvinyl chloride but not otherwise supported or *lined* * * * (Emphasis added.)

Customs takes into account the weight of linings when classification depends on the weight of certain components making up the footwear. For example, see subheadings 6404.19.25–6404.19.35, HTSUSA.

History – Draft Conversion of TSUS to HTS:

The thrust of the importer's argument is that the drafters of the HTS did not intend to subject the type of footwear in issue to the 37.5% rate of duty applicable to protective footwear.

The importers made two points. The first was that as a result of discussion among the responsible agencies of the U.S. Government, including Customs and representatives of importers and domestic industry, the reference to component material of chief value was eliminated in favor of a unitary 10.5% rate of duty applicable to all such footwear regardless of the component material of chief value or gender. Further, this approach was *extended* to footwear other than sports footwear. (Emphasis added).

The second point made was in reference to a letter dated April 22, 1983, addressed to the International Trade Commission by the Volume Footwear Retailers of America, the predecessor of Footwear Distributors and Retailers of America. Briefly, it was requested in this letter that the lower rate of duty be extended to cover footwear other than sports and athletic footwear. Counsel asserts that the final version of the HTS

adopted this request and extended the lower duty rate of all footwear having textile uppers with leather overlays. Further, counsel submits that subheadings 6404.11.20 and 6404.19.15 were crafted carefully to extend to the HTS the same treatment for this type footwear that had been applied under the TSUS.

The claims made in both points are not verifiable. There has been no evidence submitted that the domestic interests agreed under point 1 that the lower rate was to be extended to footwear other than sports footwear. As to point 2, the claim is also unsubstantiated. A reading of the subheadings in issue does not persuade us that these provisions were specially crafted to extend to the HTS the lower rates of duty for this type of footwear that had been applied under the TSUS.

We note that men's plastic athletic footwear with very large amounts of leather overlays which were classified as leather footwear with duty at the rate of 8.5% under the TSUS are clearly classifiable in heading 6402, HTSUS, with duty at the rate of 20% or more. Thus it is certain that the statement that all athletic footwear with over 50% leather external surface in the TSUS was to have a duty rate of 10.5% in the HTSUS is incorrect.

Relative Specificity:

In HRL 086993 dated June 12, 1990, issued to Kodiak USA, Customs ruled that certain boots with textile and leather uppers and rubber soles were more specifically described in subheading 6404.19.20, HTSUSA, than under subheading 6404.19.15, HTSUSA. The rationale for this position was that the provision for protective footwear in subheading 6404.19.20 is a use provision which is considered to be a more specific description of the footwear than the physical description of the footwear in subheading 6404.19.15.

One of the commenters indicated that the characterization by Customs of the provision in subheading 6404.19.20 for "[f]ootwear designed to be worn over, or in lieu of, other footwear as a protection against water, oil, grease or chemicals or cold or inclement weather" as a use provision is not entirely accurate. It was suggested that the provision is more accurately described as both a "use" and "design" provision. We agree with this assessment and would now characterize the protective provision in subheading 6404.19.20 as essentially a "designed for use" provision.

The importers assert that even if we assume that the footwear in issue is protective, and, therefore, described by subheading 6404.19.20 that subheading is not more specific than subheading 6404.19.15. They argue that "the 'rule' that a use provision is always more specific than an *eo nomine* provision, the 'rule' relied on by Customs in HRL 086993 does not exist." Our position in this matter is that the protective footwear provision in subheading 6404.19.20 is a "designed for use" provision rather than a "use" provision. Further, subheading 6404.19.15 is not an *eo nomine* provision. It is a provision containing a physical description of the footwear.

It is argued that the doctrine of relative specificity requires that the footwear in issue be classified under the provision having requirements which are the more difficult to satisfy. It is asserted that the requirements of subheading 6404.19.15 are harder to satisfy than the provision for protective footwear in subheading 6404.19.20. Further, that subheading 6404.19.15 was designed to carry over to the HTS the leather rate of duty for a narrow class of footwear which because of a change in the manner of ascertaining the material of the upper, are classified as having textile uppers.

It remains our opinion that the provision for protective footwear in subheading 6404.19.20 is a more specific description of the footwear involved than the physical description of the footwear in subheading 6404.19.15. It is our observation that a requirement that the footwear be designed to be worn over or in lieu of other footwear for protective purposes is harder to satisfy than a requirement that the footwear fit a particular physical description. Further, we note that footwear imports under subheading 6404.19.15 are mostly beach sandals but also include a wide range of shoes including fabric high heeled formal shoes with snakeskin overlays to canvas work boots with leather overlays.

Language which is invasive in character has been held to mean that every other provision in the Tariff Act of 1930 must yield to it, in the absence of specific exception. *Madame Adele v. United States*, 23 CCPA 305, T.D. 48176 (1936); *United States v. C.I. Penn*, 27 CCPA 242, C.A.D. 93 (1940) and cases cited. In those cases it was held that the language "by whatever name known and to whatever use applied, and whether or not named, described, or provided for elsewhere in the act" was invasive and superseded any other provision which might cover the merchandise." Sturm, Customs Law & Administration S. 52.8 (Third Edition 1989).

Importers assert that because subheading 6404.19.15 is an exception to the general rule (note 4(a) to Chapter 64) which excludes accessories and reinforcements from consideration as external surface area of the upper, it is in that sense invasive and as such, it is the more specific provision.

In the case of *Swiss Manufacturer's Association, Inc. et al. v. United States*, 39 Cust. Ct. 227, 237, C.D. 1933 (1957), appeal dismissed 45 CCPA 129 (1958), the court stated that the "doctrine [of invasion] has never been applied except in cases where the language of the invading provision is so sweeping, clear, and definite as to the goods subjected to its operation that there is no room for interpretation and no doubt left as to the goods which Congress meant to include * * *."

Even if we were to concede that subheading 6404.19.15 is invasive, we would not be able to say that its language is so sweeping, clear, and definite as to leave no doubt that Congress intended that the footwear in issue be classified therein.

In the event that the provision for protective footwear in subheading 6404.19.20 is not considered to be a more specific provision for the sub-

ject footwear than the physical description for such footwear in subheading 6404.19.15, we submit that it is equally applicable. Consequently, following General Rule of Interpretation 3(c), classification under subheading 6404.19.20 is appropriate as "* * * the heading which occurs last in numerical order among those which equally merit consideration."

Congressional Intent:

Based on the legislative history of the protective footwear provisions, counsel for the importers would limit their application to rubbers and galoshes and "footwear designed for a particular commercial, or industrial use, such as fishing, fire-fighting, chemical manufacturing and dairies."

It is our observation that this view of the scope of the "protective footwear" provision is too restrictive in that it does not take into account changes made in the TSUS expanding the scope of the "protective footwear" provision beyond the former 90% exterior rubber or plastic group of footwear to a broader category of rubber or plastics soled footwear having uppers of various materials such as fibers, provided that less than 50% of the exterior area was of leather and less than 90% of the exterior surface area was of rubber or plastics and combinations of such materials.

When the HTSUSA replaced the TSUS in 1989 the new schedule included the same protective provision in eleven different places in headings 6401, 6402, 6404 and 6406. In doing so Congress extended the application of the "protective footwear" provisions further to classifications within such headings as 6404, including subheading 6404.19.20 and which is applicable to footwear with textile uppers which are over 50% external surface area of leather, when including the leather accessories or reinforcements mentioned in note 4(a) to Chapter 64, HTSUSA.

Primarily Designed—Principal Use:

Additional U.S. Rule of Interpretation 1(a), HTSUSA, reads as follows:

> 1. In the absence of special language or context which otherwise requires—
>
> (a) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use;

Additional U.S. Note 3 to Chapter 64 provides that "[f]or the purposes of heading 6401 '*waterproof footwear*' means footwear specified in the heading, designed to protect against penetration by water or other liquids, whether or not such footwear is primarily designed for such purposes."

Counsel for the importers insists that footwear does not come within the protective provision of subheading 6404.19.20 unless it is primarily

designed and principally used as "a protection against water, oil, grease or chemicals or cold or inclement weather."

Counsel submits that Additional U.S. Note 3 to Chapter 64 supports the application of principal use to subheading 6404.19.20. Further, it is argued when Congress intended that footwear designed to protect against water or liquids be classified according to that characteristic, *even when* it was principally designed to be used for other than waterproof footwear, it clearly made that intent known. Further, the failure of Congress to provide such language to expand the coverage of subheading 6404.19.20 is evidence of its intention that the principal use concept was to be applied to this provision.

Counsel would by implication apply this Additional Note to subheading 6404.19.20 which would limit coverage therein to footwear principally designed as protective footwear. We disagree. Heading 6401 and subheading 6404.19.20 are completely different provisions. In order to be classified under heading 6401 the footwear must be waterproof and be constructed in a particular manner. There is no requirement in subheading 6404.19.20 that footwear classified therein be waterproof [designed to protect against penetration by water or other liquids] or primarily designed to be protective. It is clear that Additional U.S. Note 3 has application solely to heading 6401, HTSUSA.

Additional U.S. Rule of Interpretation 1(a), HTSUSA, is not relevant in this instance because, as stated previously, Customs considers the protective footwear provision in subheading 6404.19.20 as essentially a "designed for use" provision.

To determine the proper interpretation of the protective footwear provision, we must look to the Court decisions involving articles which were either "specially designed for use" or "specially constructed for a particular purpose." As noted by Counsel for domestic producers of dual purpose footwear, in the case of *David E. Porter v. United States*, 76 Cust. Ct. 97, C.D. 4641 (1976), involving an interpretation of the phrase "specially designed for use," the court held that gloves specially designed for the sport of Motocross were properly classified as gloves specially designed for use in sports as claimed even though they were not use exclusively in the sport of Motocross. In reaching its decision the court cited with approval the result reached in the case of *Plus Computing Machines, Inc., v. United States*, 44 CCPA 160, CAD 655 (1957), involving an interpretation of the phrase "specially constructed for a particular purpose." In reaching its conclusion the appeals court at page 167 made the following statement:

> In ordinary usage, the statement that an article is specially constructed for a particular purpose means merely that it includes particular features which adapt it for that purpose. The purpose in question *need not be the sole one* served by the article and *may not even be the principal one*. Thus snow-tread tires are specially constructed for driving in snow even though in practice, they may seldom be used for that purpose, and armored trucks are specially

constructed to give protection against bullets, even though they may never be fired upon. (Emphasis added.)

The conclusion which we draw from these cases is that footwear which is designed for protective purposes is covered by the protective footwear provision even though the footwear may also be designed for non-protective purposes.

Designed for Protection:

The importers maintain that hiking boots with GORE-TEX liners are not peculiarly and specifically fitted for use as protective footwear. Further, the protective feature provided by the GORE-TEX insert is no more than a secondary or ancillary function of the hiking boot.

We disagree. The GORE-TEX insert in the hiking boot is placed there for a particular purpose and that purpose is to provide protection against rain and snow solely for use in inclement weather does not take into account the advances in footwear technology which spawned a wide range of changes in shoe usages. One of these advances was the advent of footwear like the hiking boots in issue which serve a dual purpose i.e., protection against water and comfort (breathability). There is no doubt that when the dual purpose hiking boot is chosen over another hiking boot which provides comfort but lacks the protective feature of GORE-TEX, it is being chosen "in lieu of" the "non-protective" boot because of its protective function.

Advertising:

We disagree with the statement that advertising claims are irrelevant. Advertising provides product information geared to induce consumer purchases. While some of the claims are exaggerated, the information provided by advertisements quite often shed light on how products are designed and their usages which are of assistance to Customs officers in determining the tariff classification of those products.

In fact, Customs has repeatedly relied on design features principally promoted in the marketing of specific footwear. Specifically, in Headquarters Ruling Letter (HRL) 084834 dated October 18, 1989, concerning the classification of PVC riding boots Customs relied partially on advertising statements to find that the boots were in fact dual purpose. In that ruling, however, Customs also relied on advertising to find, ultimately, that the boot was designed for protective purposes. In doing so, Customs stated, "[i]t is our observation that the emphasis on the waterproof qualities of the PVC rubber boots in the advertising material submitted shows that the companies who market these boots consider the waterproof characteristics of the boots as a major selling point." Also, in Internal Advice Request No. 33/83 (HRL 073118) dated November 16, 1983, concerning the classification of ladies' fashion winter boots, Customs relied heavily on advertising to find that a GORE-TEX lined boot with uppers of textile materials was designed to be protective against wind, cold weather and water.

The courts have considered advertising material as a factor in determining tariff classification. Specifically, in the case of *Guardian Industries Corporation v. United States*, 3 CIT 9 (1982), concerning the classification of flat pieces of tempered glass which are used in sliding glass patio doors, the court took notice of advertising material stating as follows:

> What is more, plaintiff's *own sales brochure* shows that due to its characteristics float or annealed glass can be used in any type of building with many applications. In contrast, in the same brochure, plaintiff's tempered glass is recommended only for certain applications such as certain windows, enclosures and entrances where it is important to protect people against the hazards of normal glass breakage. Thus, the uses of the tempered glass are much more limited and specialized than the uses of float glass. (Emphasis added.)

Conclusion:

After careful consideration of the comments and following further review of the matter, we have concluded the following;

1. The scope of the phrase "footwear designed to be worn over or in lieu of other footwear as a protection against water, oil, grease, or chemicals or cold or inclement weather" in subheading 6404.19.20, HTSUSA, has been expanded to include dual purpose rubber or plastic soled footwear [e.g., hiking boots with GORE-TEX liners] with textile uppers, which are over 50 percent external surface area of leather, when including the leather accessories or reinforcements mentioned in note 4(a) to Chapter 64, HTSUSA.
2. The hiking boots with GORE-TEX liners are more specifically described by the protective provision of subheading 6404.19.20, HTSUSA, than by the physical description set out in subheading 6404.19.15, HTSUSA.

Special Criteria:

It has been suggested that the use of certain techniques and new materials in the manufacture of footwear with textile uppers, textile uppers with leather accessories or reinforcements, or stitched rubber or plastic uppers would cause this type of footwear to fall within the protective provision of heading 6402 or 6404, HTSUSA. Some examples of these techniques and newer materials are listed as follows:

1. coating the exterior or interior of textile uppers with polyurethane or other waterproof or water resistant materials;
2. sealing the seams of footwear having stitched rubber or plastic uppers;
3. tanning the leather of uppers so as to render it waterproof or water repellent;
4. treating the interior or exterior of textile or of textile and leather upper footwear with materials that protect against chemicals or cold weather;

5. using heavy pile or other materials that serve to protect against cold as full linings or liners for textile upper, textile and leather upper, leather upper, and stitched rubber or plastic upper footwear; and
6. using materials such as GORE-TEX as seamless linings or booties in textile upper, stitched rubber or plastic upper, or leather upper footwear.

The use of GORE-TEX linings in footwear affords significant protection against water so as to qualify that footwear for classification as "protective footwear." However, it is our position that hard and fast rules should not be made as to whether the use of new materials and techniques in the manufacture of footwear as listed above would automatically qualify that footwear as "protective footwear." It is possible that the use of one or a combination of these techniques in the manufacture of footwear could cause that footwear to be "protective" for tariff purposes. However, this type of determination should be made on a case by case basis after a careful examination of the physical features of the footwear in question.

Delay of Effective Date:

In accordance with section 177.9(e) of the Customs Regulations (19 CFR 177.9(e)), the effective date of this determination made in this rule will be delayed. From the comments received and our own investigation, it is apparent that confusion existed as to the classification of protective footwear (e.g., hiking boots with GORE-TEX linings) on the part of importers, the domestic producers, and Customs. In addition, we believe that many entries of such footwear were filed and accepted by Customs under subheading 6404.19.15, HTSUS, at the 10.5 percent ad valorem duty rate.

Because the determinations made in this rule will have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions, and to allow importers of such footwear (e.g., hiking boots with GORE-TEX linings) who relied on this treatment to make appropriate arrangements for future transactions, it has been determined appropriate to delay the effective date for 90 days from the date of this notice.

Dated: March 24, 1992.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

(T.D. 92–33)

REVOCATION OF CUSTOMS BROKER LICENSES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: Notice is hereby given that on March 24, 1992, the Secretary of the Treasury, pursuant to Section 641, Tariff Act of 1930, as amended, (19 U.S.C. 1641), and Part 111.74 of the Customs Regulations, as amended (19 CFR 111.74), ordered the revocation of the following broker licenses due to the failure of the broker to file the triennial report as required by 19 CFR 111.30(d). Hence, the subject licenses are revoked. These licenses were issued in the Los Angeles district.

Broker name	License No.
Norvin E. Alcorn	7154
Martin Altman	3940
Harlan Anderson	9445
Roger C. Anderson	4015
Joanne Antall	6982
Ronald Arrin	7632
Mark Bacic	4466
Deborah Batist	6144
Charles Barnett	3939
George A. Bateman	2347
Kay Bennett	4900
Thomas Allen Biggs	5467
Dale L. Borhaug	7187
Neil Brooksby	10626
Donald Michael Buynak	7682
Barbara Ellen Carroll	9189
Joseph G. Cauchon	2453
Charles Crow	6004
Paul Cinecone	5984
Joseph B. Cheap	2152
Leland J. Coontz, III	9435
Eileen S. Cross	6931
Keith L. Curtis, Sr.	5157
David Dalldorf	5117
Rebecca L. Dearing	11830
Susanna Des Marias	6930
Hector M. Diaz	2533
Gerald E. Dickey	9579
James Joseph Dobson	3855
Tom J. Dorlis	9701
Donald Doss	4569
Alberta N. Duncan	2656
Linda Lee Fetscher	5664
Howard Daniel Fisher	3297
Scott Kendall Flora	9086
Ola L. Foley	5398
Bernard L. Friedman	5114
David M. Gaylor	7152
Russell C. Greene	6076
Joanne Graham	11377
Susan K. Grimm	7215
Nancy Lillian Gulish	4790
Peter Michael Guyer	11221
Joanne Hanson	9457
Deborah S. Hoyt Harris	9335
Nellie S. Harrison	5167
Dale Jay Hollingshead	9540
Kristeen Anne Hulburt	8034
James B. Humphrey	5800
Leslie Hyland	9139
Deborah Ann Karen	6467
Kevin Edward Kearney	7018
Bradley A. Kint	4218
Robert M. Kosslyn	5529
Lionel Nello Levy	9789
Howard Liu	9429
Charles A. Loomis	4232
Paul G. Lopez	7776
Frederick William Luessen	9484
Brandon R. MacDuff	9089
Johnathan D. McClean	9430
Michael Patrick McMullen	9132
Francis M. Mecham	3977
David J. Miller	6457
Gene O. Miller	2254
Samuel R. Montague	5263
Carmen Mornburgh	10629
David A. Mulherin	4278
Michael A. Nack	11517
Raeleen Newman	7186
Donna Joanne Nuss	7744
Robert Eugene Pambert	10666
Alvin F. Papke, Jr.	5989
Hal Pepe	10598
Debra M. Perkins	11264
James Robert Phillips	5757

REVOCATION OF CUSTOMS BROKER LICENSES (continued)

Broker name	License No.
Mary K. Pindur	4934
Samuel Plon	3288
Bonnie Prange	10973
Deborah Amthor Rankin	7075
Michael Walter Reasoner	5752
Deborah Riding	11324
Joan M. Robb	4844
Louis F. Romanello	4094
Frank Saccocio	11140
Shozo Saito	3616
George B. Salas	4442
Richard E. Santiestevan	3882
Earl R. Sauls	2615
Michael B. Schubert	5951
Richard Ernest Seggesser	4626
Harold A. Shubin	5293
Louis Silverman	6296
Herman Simmons	6318
Ellen Baker Snell	6164
Stephen M. Stambuk	2250
Louis R. Terrile	4031
James Steiner	4534
George S. Strong, Jr.	9417
Peter Dal Suh	9821
Allen Sundell	2834
Emily Szu Tu	11090
Joanna Marie Tabatabai	9444
Donald G. Stava	5033
Carmen E. Thornburgh	10627
Dolores Bribiesca Villegas	7096
Eric C. Von Coelln	11950
Patricia A. Wade	05445
Leonard A. Webster	2256
Stanley Edward Wells	5528
Katherine White	2454
Wendy Cordeiro White	9589
David M. Wick	4843
Acclerated Customs Brokers, Inc.	7304
All Transport, Inc	6988
Berry & McCarthy Shipping Company, Inc.	7406
Bostrum Warren, Inc.	5888
Burlington	11088
Comport Air International, Inc.	6122
Consolidated Freightways Export/Import Inc.	7651
D&D Freight Service, Inc.	9845
Bruce Duncan, Co.,	7593
HW Dorf Company Inc. of Cal.	1860
M.B. Ingham & Son, Inc.	6310
KTS Customs Brokers	10666
L.A. Global Services, Inc.	7762
Laufer Shipping (Cal). Co., Inc.	9550
Levy & Associates	10632
Matsukawa and Associates	4522
Movers Port Service, Inc.	9095
SEI Group of Companies, Inc.	7365
Earl R. Sauls Associates	5251
Shipco, Inc.	4861
Superior Customs Brokers, Inc.	5450
Surface Freight Corp.	2016
Union Air Transport GMBM, Inc.	7179
F.B. Vandergrift Co., Inc.	6919
WITS, Inc.	4735
Steve Zamarripa, Inc.	10967

Dated: March 27, 1992.

C.L. BRAINARD,
Director,
Office of Trade Operations.

[Published in the Federal Register, April 2, 1992 (57 FR 11348)]

(T.D. 92–34)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved December 16, 1991, to January 31, 1992, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and approvals under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: March 31, 1992.

File: DRA–1–09
223795

JOHN DURANT,
Director,
Commercial Rulings Division.

(A) Company: ABB Trading (US) Inc.
Articles: Calcined petroleum coke
Merchandise: Petroleum coke
Factories: Chalmette, Norco & Gramercy, LA; Purvis, MS
Proposal signed: November 13, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 21, 1992

(B) Company: American Cyanamid Co.
Articles: Herbicide
Merchandise: 4-nitro-o-xylene
Factory: South River, MO
Proposal signed: October 14, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, December 17, 1991

(C) Company: Chevron Chemical Co.
Articles: OLOA 340D and OLOA 340R
Merchandise: Isostearic acid
Factory: Belle Chasse, LA
Proposal signed: September 10, 1991
Basis of claim: Used in
Contract forwarded to RCs of Customs: Houston & Long Beach (San Francisco Liquidation), January 21, 1992

(D) Company: Chevron Chemical Co.
Articles: Blended alpha olefins
Merchandise: Alpha olefins: butene; hexene; octene; decene; dodecene; tetradecene; hexadecene; octadecene; C20–C24; C24–C28; C30+
Factory: Baytown, TX
Proposal signed: August 8, 1990
Basis of claim: Used in
Contract forwarded to RCs of Customs: Houston & Long Beach (San Francisco Liquidation), December 23, 1991

(E) Company: Citrus World, Inc.
Articles: Blended orange and grapefruit juice from concentrate; blended orange and pineapple juice from concentrate
Merchandise: Concentrated orange juice for manufacturing
Factory: Lake Wales, FL
Proposal signed: September 26, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, January 22, 1992

(F) Company: DSM Chemicals North America Inc.
Articles: Molten caprolactam monomer; flaked caprolactam
Merchandise: Cyclohexane
Factory: Augusta, GA
Proposal signed: November 1, 1991
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: New York, January 31, 1992

(G) Company: Furon Co., Bunnell Plastics Div.
Articles: Rod, tube, sheets, tape, shapes, pipe liners, and molded products
Merchandise: Teflon PFA
Factory: Mickelton, NJ
Proposal signed: March 14, 1991
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 22, 1992
Revokes: T.D. 90–38–K to cover a change in name from Fluorocarbon Co., Bunnell Plastics Div.

(H) Company: Furon Co., Bunnell Plastics Div.
Articles: Rod, tube, sheets, tape, shapes, pipe liners, and molded products
Merchandise: Fluorinated ethylene polymer
Factory: Mickelton, NJ
Proposal signed: March 14, 1991
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 22, 1992
Revokes: T.D. 90–38–J to cover a change in name from Fluorocarbon Co., Bunnell Plastics Div.

(I) Company: Givaudan Corp.
Articles: Lilial crude
Merchandise: Tertiary butyl benzaldehyde
Factory: Clifton, NJ
Proposal signed: October 15, 1990
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, December 16, 1991

(J) Company: Givaudan Corp.
Articles: Lilial pure
Merchandise: Tertiary butyl benzaldehyde
Factory: Clifton, NJ
Proposal signed: October 15, 1990
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, December 16, 1991

(K) Company: Great Lakes Carbon Corp.
Articles: Finished graphite electrodes; finished graphite nipples; unfinished graphite electrodes; unfinished graphite nipples
Merchandise: Unfinished graphite electrode blanks; calcinated petroleum coke
Factories: Morganton, NC; Niagara Falls, NY; Altus, AR; Hickman, KY
Proposal signed: September 25, 1991
Basis of claim: Used in, less valuable waste
Contract forwarded to RC of Customs: New York, January 21, 1992
Revokes: T.D.s 87–101–E and 87–101–F

(L) Company: Hilton Davis Co.
Articles: CVL and CVL-T, colorformer dyes
Merchandise: Sodium salt of meta nitrobenzene sulfonic acid; para-dimethyl amino benzaldehyde
Factory: Cincinnati, OH
Proposal signed: February 5, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 21, 1992

(M) Company: Houghton Chemical Corp.
Articles: Antifreeze
Merchandise: Ethylene glycol
Factories: At its agents operating under T.D. 55027(2) and/or T.D. 55207(1)
Proposal signed: November 19, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, December 26, 1991

(N) Company: Huntsman Polypropylene Corp.
Articles: Homopolymer and copolymer polypropylene resins
Merchandise: Propylene
Factory: Woodbury, NJ
Proposal signed: December 4, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: Houston, December 26, 1991

(O) Company: Lykes Pasco, Inc.
Articles: Frozen orange juice
Merchandise: Orange juice, not concentrated, not reconstituted and unsweetened
Factory: Dade City, FL
Proposal signed: October 21, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: Miami, January 31, 1992

(P) Company: MacAndrews and Forbes Co.
Article: Licorice paste; licorice spray dried; licorice semi-fluid (liquid)
Merchandise: Licorice extracts
Factory: Camden, NJ
Proposal signed: June 18, 1991
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, December 17, 1991
Revokes: T.D. 91–72–L (MacAndrews & Forbes Group, Inc. d/b/a MacAndrews & Forbes Co.) and T.D. 91–72–S (Revlon, Inc., d/b/a MacAndrews & Forbes Co.)

(Q) Company: Merck & Co., Inc.
Articles: DLAAN
Merchandise: Vanillin technical; dimethylsulfoxide technical – bulk
Factory: Albany, GA
Proposal signed: September 19, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 21, 1992
Revokes: T.D. 84–194–N

(R) Company: Solvay Polymers, Inc.
Articles: Homopolymer and copolymer polypropylene resins
Merchandise: Propylene
Factory: Deer Park, TX
Proposal signed: October 23, 1991
Basis of claim: Used in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 28, 1992
Revokes: T.D. 91–67–X to cover successorship from Soltex Polymer Corp.

(S) Company: Solvay Polymers, Inc.
Articles: High density polyethylene
Merchandise: Ethylene
Factory: Deer Park, TX
Proposal signed: October 23, 1991
Basis of claim: Used in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 27, 1992
Revokes: T.D. 91–72–V to cover successorship from Soltex Polymer Corp.

(T) Company: Stollberg Inc.
Articles: Metallic oxide casting powders
Merchandise: KG slag; flyash; petalite; kryolith
Factory: Niagara Falls, NY
Proposal signed: January 17, 1989
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Chicago, January 21, 1992

(U) Company: Teledyne Industries, Inc., Teledyne Wah Chang Albany Div.
Articles: Zirconium and zirconium alloy products
Merchandise: Zirconium ingot and zirconium sponge
Factory: Albany, OR
Proposal signed: August 22, 1991
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation). January 21, 1992
Revokes: T.D. 67–53–R as amended by T.D. 73–51–Z

(V) Company: The Uniroyal Goodrich Tire Co.
Articles: Polyester tire fabrics; polyester belting fabrics; polyester hose yarns; fiberglass tire fabrics; nylon tire fabrics; nylon belting fabrics
Merchandise: Nylon and polyester filament yarns; fiberglass filament yarn
Factories: Hogansville & Thomaston, GA; Winnsboro, SC; Scottsville, VA
Proposal signed: October 29, 1991
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 13, 1992
Revokes: T.D. 89–54–W to reflect dissolution of partnership between Uniroyal and Goodrich, and to cover The Uniroyal Goodrich Tire Company as a corporation

(W) Company: The Uniroyal Goodrich Tire Co.
Articles: Synthetic rubber products; styrene butadiene rubber products; emulsion butadiene rubber products
Merchandise: Butadiene
Factory: Port Neches, TX
Proposal signed: October 29, 1991
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 13, 1992
Revokes: T.D. 91–45–X to reflect dissolution of partnership between Uniroyal and Goodrich, and to cover The Uniroyal Goodrich Tire Company as a corporation

(X) Company: The Uniroyal Goodrich Tire Co.
Articles: Tires; tread rubber
Merchandise: Various chemicals; polyester fabric and cord; synthetic rubber; polyethylene wrap; fiberglass tire cord; bronze-plated bead wire; nylon tire cord; brass plated steel tire cord
Factories: Ardmore, OK; Opelika & Tuscaloosa, AL; Woodburn, IN; Eau Claire, WI
Proposal signed: October 29, 1991
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 13, 1992
Revokes: T.D. 89–54–T to reflect dissolution of partnership between Uniroyal and Goodrich, and to cover The Uniroyal Goodrich Tire Company as a corporation

(Y) Company: The Uniroyal Goodrich Tire Co.
Articles: Yarns; synthetic industrial fabrics
Merchandise: Modacrylic staple fiber
Factories: Scottsville, VA; Hogansville & Thomaston, GA; Winnsboro, SC
Proposal signed: October 29, 1991
Basis of claim: Appearing in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, January 13, 1992
Revokes: T.D. 89–54–U to reflect dissolution of partnership between Uniroyal and Goodrich, and to cover The Uniroyal Goodrich Tire Company as a corporation

(Z) Company: White Consolidated Industries, Inc.
Articles: Room air conditioners
Merchandise: Compressors; annealed seamless deoxidized copper tubing; plastic control knobs
Factory: Edison, NJ
Proposal signed: January 21, 1992
Basis of claim: Appearing in
Contract forwarded to RCs of Customs: New York & Chicago, January 31, 1992

APPROVALS UNDER T.D. 84–49

(1) Company: AroChem International, Inc.
Articles: Various petroleum products and petrochemicals
Merchandise: Crude petroleum; petroleum derivatives; gas condensate
Factory: Penuelas, PR
Proposal signed: July 16, 1991
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RC of Customs: Houston, February 21, 1992

(2) Company: Oxy Petrochemicals Inc.
Articles: Benzene; butadiene; propylene; ethylene; butylene; ethylbenzene; pyrolysis gasoline; crude isoprene
Merchandise: Class IV naphthas
Factories: Chocolate Bayou & Corpus Christi, TX
Proposal signed: August 1, 1991
Basis of claim: As provided in T.D. 84–49
Contract forwarded to RC of Customs: Houston, January 21, 1992

(T.D. 92–35)

FOREIGN CURRENCIES

QUARTERLY RATES OF EXCHANGE: APRIL 1 THROUGH JUNE 30, 1992

The table below lists rates of exchange, in United States dollars for certain foreign currencies, which are based upon rates certified to the Secretary of the Treasury by the Federal Reserve of New York under provisions of 31 U.S.C. 5151, for the information and use of Customs officers and others concerned pursuant to Part 159, subpart C, Customs Regulations (19 CFR 159, Subpart C).

Country	Name of currency	U.S. dollars
Australia	Dollar	$0.766600
Austria	Schilling	0.086022
Belgium	Franc	0.029412
Brazil	Cruzado	N/A
Canada	Dollar	0.839278
China, P.R.	Renminbi yuan	0.182442
Denmark	Krone	0.156140
Finland	Markka	0.221680
France	Franc	0.178619
Germany	Deutsche mark	0.605694
Hong Kong	Dollar	0.129182
India	Rupee	0.034483
Iran	Rial	N/A
Ireland	Pound	1.612000
Italy	Lira	0.000803
Japan	Yen	0.007435
Malaysia	Dollar	0.386847
Mexico	Peso	N/A
Netherlands	Guilder	0.537981
New Zealand	Dollar	0.545000
Norway	Krone	0.154261
Philippines	Peso	N/A
Portugal	Escudo	0.007010

FOREIGN CURRENCIES—Quarterly rates of exchange: April 1 through June 30, 1992

Country	Name of currency	U.S. dollars
Singapore	Dollar	$0.602047
South Africa, Republic of	Rand	0.347826
Spain	Peseta	0.009562
Sri Lanka	Rupee	0.023195
Sweden	Krona	0.166861
Switzerland	Franc	0.662691
Thailand	Baht (tical)	0.039032
United Kingdom	Pound	1.726500
Venezuela	Bolivar	N/A

(LIQ–03–01 S:NISD CIE)
Dated: April 1, 1992.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 92–36)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR MARCH 1992

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign countries shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

March 2, 1992	$0.005267
March 3, 1992	.005223
March 4, 1992	.005183
March 5, 1992	.005195
March 6, 1992	.005188
March 9, 1992	.005199
March 10, 1992	.005181
March 11, 1992	.005204
March 12, 1992	.005189
March 13, 1992	.005196
March 16, 1992	.005199
March 17, 1992	.005229
March 18, 1992	.005238

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 1992 (continued):

Greece drachma (continued):

March 19, 1992	$0.005172
March 20, 1992	.005149
March 23, 1992	.005156
March 24, 1992	.005181
March 25, 1992	.005225
March 26, 1992	.005175
March 27, 1992	.005233
March 30, 1992	.005221
March 31, 1992	.005229

South Korea won:

March 2, 1992	$0.001295
March 3, 1992	.001293
March 4, 1992	.001294
March 5, 1992	.001294
March 6, 1992	.001294
March 9, 1992	.001294
March 10, 1992	N/A
March 11, 1992	.001293
March 12, 1992	.001292
March 13, 1992	.001291
March 16, 1992	.001290
March 17, 1992	.001289
March 18, 1992	.001289
March 19, 1992	.001287
March 20, 1992	.001285
March 23, 1992	.001286
March 24, 1992	N/A
March 25, 1992	.001285
March 26, 1992	.001284
March 27, 1992	.001284
March 30, 1992	.001284
March 31, 1992	.001283

Taiwan N.T. dollar:

March 2, 1992	$0.039697
March 3, 1992	.039562
March 4, 1992	.039532
March 5, 1992	.039579
March 6, 1992	N/A
March 9, 1992	.039565
March 10, 1992	.039569
March 11, 1992	.039480
March 12, 1992	.039452
March 13, 1992	.039417
March 16, 1992	.039310
March 17, 1992	.039289
March 18, 1992	.039246
March 19, 1992	.039262
March 20, 1992	.039231
March 23, 1992	.039121
March 24, 1992	.039131
March 25, 1992	.039216

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for March 1992 (continued):

Taiwan N.T. dollar (continued):

March 26, 1992	$0.039200
March 27, 1992	.039154
March 30, 1992	N/A
March 31, 1992	.039203

(LIQ–03–01 S:NISD CIE)

Dated: April 2, 1992.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

(T.D. 92–37)

FOREIGN CURRENCIES

VARIANCES FROM QUARTERLY RATES FOR MARCH 1992

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 92–1 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Holiday: None

Austria schilling:

March 2, 1992	$0.086550
March 3, 1992	.085796
March 4, 1992	.085034
March 5, 1992	.085020
March 6, 1992	.085121
March 9, 1992	.085412
March 10, 1992	.084998
March 11, 1992	.085470
March 12, 1992	.084955
March 13, 1992	.085251
March 16, 1992	.085357
March 17, 1992	.085948
March 18, 1992	.086096
March 19, 1992	.084998
March 20, 1992	084588

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Austria schilling (continued):

March 23, 1992	$0.085121
March 24, 1992	.085408
March 25, 1992	.086036
March 26, 1992	.085521
March 27, 1992	.086382
March 30, 1992	.086185
March 31, 1992	.086356

Belgium franc:

March 2, 1992	$0.029621
March 3, 1992	.029351
March 4, 1992	.029078
March 5, 1992	.029095
March 6, 1992	.029129
March 9, 1992	.029231
March 10, 1992	.029078
March 11, 1992	.029197
March 12, 1992	.029053
March 13, 1992	.029163
March 16, 1992	.029180
March 17, 1992	.029377
March 18, 1992	.029446
March 19, 1992	.029087
March 20, 1992	.028960
March 23, 1992	.029095
March 24, 1992	.029206
March 25, 1992	.029420
March 26, 1992	.029231
March 27, 1992	.029551
March 30, 1992	.029455
March 31, 1992	.029507

Denmark krone:

March 2, 1992	$0.157060
March 3, 1992	.155763
March 4, 1992	.154416
March 5, 1992	.154464
March 6, 1992	.154727
March 9, 1992	.154919
March 10, 1992	.154154
March 11, 1992	.154907
March 12, 1992	.154024
March 13, 1992	.154679
March 16, 1992	.154871
March 17, 1992	.155678
March 18, 1992	.156018
March 19, 1992	.154143
March 20, 1992	.153657
March 23, 1992	.154297
March 24, 1992	.154631
March 25, 1992	.156006
March 26, 1992	.155111
March 27, 1992	.156715
March 30, 1992	.156201
March 31, 1992	.156531

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Finland markka:

March 2, 1992	$0.223040
March 3, 1992	.221166
March 4, 1992	.219539
March 5, 1992	.219635
March 6, 1992	.219732
March 9, 1992	.220264
March 10, 1992	.219443
March 11, 1992	.220167
March 12, 1992	.218771
March 13, 1992	.219829
March 16, 1992	.219877
March 17, 1992	.221337
March 18, 1992	.222370
March 19, 1992	.219515
March 20, 1992	.218675
March 23, 1992	.219563
March 24, 1992	.220313
March 25, 1992	.222272
March 26, 1992	.220824
March 27, 1992	.222916
March 30, 1992	.222173
March 31, 1992	.222618

France franc:

March 2, 1992	$0.179340
March 3, 1992	.177667
March 4, 1992	.176056
March 5, 1992	.176118
March 6, 1992	.176274
March 9, 1992	.176944
March 10, 1992	.176118
March 11, 1992	.176944
March 12, 1992	.176041
March 13, 1992	.176788
March 16, 1992	.176757
March 17, 1992	.178174
March 18, 1992	.178508
March 19, 1992	.176414
March 20, 1992	.175716
March 23, 1992	.176585
March 24, 1992	.177148
March 25, 1992	.178524
March 26, 1992	.177447
March 27, 1992	.179324
March 30, 1992	.178843
March 31, 1992	.179163

Germany deutsche mark:

March 2, 1992	$0.609385
March 3, 1992	.603682
March 4, 1992	.597979
March 5, 1992	.598015
March 6, 1992	.598802

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Germany deutsche mark (continued):

March 9, 1992	$0.600781
March 10, 1992	.598086
March 11, 1992	.600673
March 12, 1992	.597729
March 13, 1992	.599988
March 16, 1992	.600312
March 17, 1992	.605144
March 18, 1992	.606428
March 19, 1992	.598802
March 20, 1992	.596054
March 23, 1992	.598982
March 24, 1992	.600781
March 25, 1992	.605694
March 26, 1992	.601685
March 27, 1992	.608088
March 30, 1992	.606318
March 31, 1992	.607349

India rupee:

March 3, 1992	$0.035842
March 4, 1992	.035842
March 5, 1992	.035651
March 6, 1992	.035842
March 9, 1992	.035778
March 10. 1992	.035971
March 11, 1992	.035907
March 12, 1992	.035587
March 13, 1992	.035461
March 16, 1992	.034990
March 17, 1992	.035112
March 18, 1992	.034965
March 19, 1992	.034965
March 20, 1992	.034783
March 23, 1992	.034188
March 24, 1992	.034188
March 25, 1992	.034483
March 26, 1992	.034183
March 27, 1992	.034423
March 30, 1992	.034843
March 31, 1992	.034364

Ireland pound:

March 2, 1992	$1.624500
March 3, 1992	1.611000
March 4, 1992	1.599500
March 5, 1992	1.599500
March 6, 1992	1.602000
March 9, 1992	1.603500
March 10, 1992	1.596000
March 11, 1992	1.602200
March 12, 1992	1.594500
March 13, 1992	1.600000
March 16, 1992	1.601000

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Ireland pound (continued):

March 17, 1992	$1.613500
March 18, 1992	1.615700
March 19, 1992	1.595500
March 20, 1992	1.584500
March 23, 1992	1.598300
March 24, 1992	1.602500
March 25, 1992	1.615500
March 26, 1992	1.602500
March 27, 1992	1.619500
March 30, 1992	1.613200
March 31, 1992	1.616000

Italy lira:

March 2, 1992	$0.000812
March 3, 1992	.000805
March 4, 1992	.000798
March 5, 1992	.000799
March 6, 1992	.000799
March 9, 1992	.000802
March 10, 1992	.000798
March 11, 1992	.000802
March 12, 1992	.000798
March 13, 1992	.000800
March 16, 1992	.000799
March 17, 1992	.000805
March 18, 1992	.000806
March 19, 1992	.000796
March 20, 1992	.000794
March 23, 1992	.000797
March 24, 1992	.000798
March 25, 1992	.000803
March 26, 1992	.000799
March 27, 1992	.000806
March 30, 1992	.000804
March 31, 1992	.000805

Japan yen:

March 3, 1992	$0.007643
March 4, 1992	.007569
March 5, 1992	.007584
March 6, 1992	.007590
March 9, 1992	.007580
March 10, 1992	.007526
March 11, 1992	.007493
March 12, 1992	.007449
March 13, 1992	.007485
March 16, 1992	.007464
March 17, 1992	.007493
March 18, 1992	.007573
March 19, 1992	.007504
March 20, 1992	.007454
March 23, 1992	.007479
March 24, 1992	.007480

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Japan yen (continued):

March 25, 1992	$0.007499
March 26, 1992	.007465
March 27, 1992	.007512
March 30, 1992	.007515
March 31, 1992	.007523

Malaysia dollar:

March 2, 1992	$0.387597
March 3, 1992	.387898
March 4, 1992	.388500
March 5, 1992	.389560
March 6, 1992	.389560
March 9, 1992	.390778
March 10, 1992	.389712
March 11, 1992	.390016
March 12, 1992	.388940
March 13, 1992	.388199
March 16, 1992	.388350
March 23, 1992	.388651
March 24, 1992	.388199
March 25, 1992	.388123
March 30, 1992	.387297
March 31, 1992	.387372

Netherlands guilder:

March 2, 1992	$0.541419
March 3, 1992	.536394
March 4, 1992	.531350
March 5, 1992	.531576
March 6, 1992	.532255
March 9, 1992	.534074
March 10, 1992	.531519
March 11, 1992	.533817
March 12, 1992	.531039
March 13, 1992	.533106
March 16, 1992	.533134
March 17, 1992	.537288
March 18, 1992	.538387
March 19, 1992	.531660
March 20, 1992	.529297
March 23, 1992	.531943
March 24, 1992	.533533
March 25, 1992	.537779
March 26, 1992	.534188
March 27, 1992	.540044
March 30, 1992	.538329
March 31, 1992	.539258

Norway krone:

March 2, 1992	$0.155376
March 3, 1992	.154083
March 4, 1992	.152823
March 5, 1992	.152788

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Norway krone (continued):

March 6, 1992	$0.152870
March 9, 1992	.153257
March 10, 1992	.152648
March 11, 1992	.153280
March 12, 1992	.152416
March 13, 1992	.152975
March 16, 1992	.153022
March 17, 1992	.153988
March 18, 1992	.154369
March 19, 1992	.152427
March 20, 1992	.151883
March 23, 1992	.152579
March 24, 1992	.152929
March 25, 1992	.154107
March 26, 1992	.153186
March 27, 1992	.154823
March 30, 1992	.154452
March 31, 1992	.154703

Portugal escudo:

March 2, 1992	$0.007065
March 3, 1992	.007015
March 4, 1992	.006947
March 5, 1992	.006947
March 6, 1992	.006947
March 9, 1992	.006961
March 10, 1992	.006944
March 11, 1992	.006966
March 12, 1992	.006940
March 13, 1992	.006952
March 16, 1992	.006954
March 17, 1992	.007010
March 18, 1992	.007025
March 19, 1992	.006928
March 20, 1992	.006928
March 23, 1992	.006959
March 24, 1992	.006974
March 25, 1992	.007033
March 26, 1992	.006971
March 27, 1992	.007047
March 30, 1992	.007025
March 31, 1992	.007032

South Africa, Republic of, rand:

March 12, 1992	$0.344947
March 24, 1992	.344531

Spain peseta:

March 2, 1992	$0.009681
March 3, 1992	.009617
March 4, 1992	.009515
March 5, 1992	.009510
March 6, 1992	.009508

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Spain peseta (continued):

March 9, 1992	$0.009528
March 10, 1992	.009479
March 11, 1992	.009528
March 12, 1992	.009452
March 13, 1992	.009465
March 16, 1992	.009497
March 17, 1992	.009574
March 18, 1992	.009592
March 19, 1992	.009461
March 20, 1992	.009434
March 23, 1992	.009501
March 24, 1992	.009517
March 25, 1992	.009590
March 26, 1992	.009526
March 27, 1992	.009611
March 30, 1992	.009590
March 31, 1992	.009600

Sri Lanka rupee:

March 2, 1992	N/A
March 3, 1992	N/A
March 4, 1992	N/A
March 5, 1992	N/A
March 6, 1992	N/A
March 9, 1992	N/A
March 10, 1992	N/A
March 11, 1992	N/A
March 12, 1992	N/A
March 13, 1992	N/A
March 16, 1992	N/A
March 18, 1992	N/A
March 19, 1992	N/A
March 20, 1992	N/A
March 25, 1992	N/A
March 26, 1992	N/A
March 27, 1992	N/A
March 30, 1992	N/A
March 31, 1992	N/A

Sweden krona:

March 2, 1992	$0.167926
March 3, 1992	.166625
March 4, 1992	.165236
March 5, 1992	.165153
March 6, 1992	.165330
March 9, 1992	.165714
March 10, 1992	.164989
March 11, 1992	.165782
March 12, 1992	.164826
March 13, 1992	.165481
March 16, 1992	.165604
March 17, 1992	.166694
March 18, 1992	.167084
March 19, 1992	.164826

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

Sweden krona (continued):

March 20, 1992	$0.164366
March 23, 1992	.165098
March 24, 1992	.165536
March 25, 1992	.166861
March 26, 1992	.165837
March 27, 1992	.167392
March 30, 1992	.167084
March 31, 1992	.167336

Switzerland franc:

March 2, 1992	$0.672133
March 3, 1992	.663570
March 4, 1992	.656168
March 5, 1992	.656082
March 6, 1992	.659196
March 9, 1992	.663130
March 10, 1992	.658545
March 11, 1992	.662910
March 12, 1992	.660939
March 13, 1992	.663350
March 16, 1992	.662032
March 17, 1992	.668226
March 18, 1992	.669882
March 19, 1992	.660066
March 20, 1992	.655523
March 23, 1992	.658979
March 24, 1992	.660284
March 25, 1992	.666667
March 26, 1992	.659413
March 27, 1992	.368226
March 30, 1992	.664805
March 31, 1992	.665779

Thailand baht (tical):

March 6, 1992	N/A
March 9, 1992	N/A
March 11, 1992	N/A

United Kingdom pound:

March 2, 1992	$1.754300
March 3, 1992	1.739000
March 4, 1992	1.723000
March 5, 1992	1.716000
March 6, 1992	1.718000
March 9, 1992	1.722500
March 10, 1992	1.714000
March 11, 1992	1.725300
March 12, 1992	1.707000
March 13, 1992	1.711500
March 16, 1992	1.715000
March 17, 1992	1.731000
March 18, 1992	1.733000
March 19, 1992	1.711000

FOREIGN CURRENCIES—Variances from quarterly rates for March 1992 (continued):

United Kingdom pound (continued):

March 20, 1992	$1.706000
March 23, 1992	1.715000
March 24, 1992	1.720000
March 25, 1992	1.732000
March 26, 1992	1.722000
March 27, 1992	1.739500
March 30, 1992	1.733000
March 31, 1992	1.736300

(LIQ–03–01 S:NISD CIE)

Dated: April 2, 1992.

MICHAEL MITCHELL,
Chief,
Customs Information Exchange.

U.S. Court of Appeals for the Federal Circuit

ST. PAUL FIRE & MARINE INSURANCE CO., PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE

Appeal No. 90–1343

(Decided March 26, 1992)

Edward M. Joffe, Sandler, Travis & Rosenberg, P.A., of Miami, Florida, argued for plaintiff-appellant. With him on the brief was *Gilbert Lee Sandler*.

Joseph I. Liebman, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendant-appellee. With him on the brief were *Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director and *Susan Burnett Mansfield*. Also on the brief was *Karen Binder*, Attorney, U.S. Customs Service, of counsel.

Appealed from: U.S. Court of International Trade.
Judge TSOUCALAS.

Before NIES, *Chief Judge*, NEWMAN and ARCHER, *Circuit Judges*.

NIES, *Chief Judge*.

St. Paul Fire & Marine Insurance Co. appeals from a decision by the United States Court of International Trade denying St. Paul's motion to amend its complaint to include claims nullifying St. Paul's obligations under its surety bond and seeking a refund of amounts St. Paul had paid for duties as surety for Opera Garments, Inc. The trial court denied the motion after determining that it lacked subject matter jurisdiction over the contract claims St. Paul sought to add. *St. Paul Fire & Marine Ins. Co. v. United States*, 729 F.Supp. 1371 (Ct. Int'l Trade 1990). We reverse.

I

BACKGROUND

This case concerns the importation of wearing apparel consisting primarily of jackets or coats. The importer of record, Opera, brought the garments into the United States, exported them to Canada for alleged repair or alteration, and then allegedly brought the same garments back into the United States for sale. On re-entry of the garments, Opera sought treatment under item 806.20 of the Tariff Schedules of the

United States (TSUS) which limits the basis of the import duty on such articles to the value of the repairs or alterations. Customs, however, for some time had been investigating Opera's operations and had concluded that the coats exported to Canada were being sold there, and that in their place, Opera was bringing back more expensive coats, thus causing a loss of revenue to the United States. Customs denied Opera's protests for treatment under TSUS 806.20 and calculated the duty on the full net invoiced value of the merchandise. After Opera failed to pay the requested duty, the government demanded payment from St. Paul, Opera's surety. St. Paul promptly paid the amount due.

St. Paul's original complaint simply appealed the denial of Opera's protests for TSUS 806.20 treatment. About a year after this suit began, St. Paul states it learned through discovery about Customs' investigation of Opera. Then St. Paul in September of 1988 moved to amend its complaint[1] to seek nullification of its bond obligations by reason of the government's breach of duties to St. Paul in failing to disclose Customs' ongoing investigations into Opera's fraudulent conduct and in failing to require deposit of full duties from Opera upon entry of the merchandise. As a result of the government's misconduct, St. Paul claims it insured a risk it would not have otherwise insured and paid monies, required under the surety bond, it would not have otherwise paid.

The trial court denied St. Paul's motion to amend its complaint because the court concluded it had no jurisdiction over the new counts. Per the court, jurisdiction in the Court of International Trade would exist if St. Paul had protested the demand for payment under the bond and appealed the denial of such protest thereby establishing jurisdiction under 19 U.S.C. § 1514(a) (3) (1988)[2] and 28 U.S.C. § 1581(a) (1988).[3]

After the motion to amend its complaint was denied, St. Paul moved for a rehearing and sought dismissal of its original complaint. The trial court denied the motion for rehearing and dismissed the action, per St. Paul's request. St. Paul now appeals the trial court's denial of its motion to amend the complaint.

II

ISSUES

1. Must St. Paul's appeal be dismissed because St. Paul requested the dismissal of its original complaint?

---

[1] For purposes of resolving this appeal, we will assume that St. Paul's allegations are true and that its motion to amend was made within a reasonable time.

[2] 19 U.S.C. § 1514(a)(3) states, in pertinent part, that:

> all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
>
> * * * * * * * * *
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade in accordance with chapter 169 of title 28 within the time prescribed by section 2636 of that title.

[3] 28 U.S.C. § 1581 (a) states as follows:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

2. If St. Paul's appeal is properly before this court, was the trial court correct in determining that it lacked jurisdiction over the claims St. Paul seeks to add?

III

APPEALABILITY

The Government asserts that since St. Paul voluntarily sought and obtained a dismissal of its action in the court below, no adverse judgment exists from which St. Paul could appeal, and that, therefore, this appeal is not properly before us. The Government is correct in that generally, "a plaintiff who has voluntarily dismissed his complaint may not sue out a writ of error." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 680 (1958); *United States v. Babbitt*, 104 U.S. (14 Otto) 767, 768 (1881); *see also* 5 J.W. Moore, *Moore's Federal Practice* paragraph 41.05[3] (2d ed. 1991). However, the Supreme Court, in *Procter & Gamble*, 356 U.S. at 680–81, set out an exception to that rule. There, the Government as plaintiff was ordered to turn over the transcript of a grand jury proceeding. To avoid being charged with civil contempt, the Government requested that the district court's order be amended to provide that, if the transcript were not produced, its complaint would be dismissed. Because production was not made, an order of dismissal was entered and the government appealed to obtain a ruling on the order to produce. The Supreme Court noted that it was understandable why the Government sought to avoid any unseemly conflict with the district court, and stated, "[w]hen the Government proposed dismissal for failure to obey, it had lost on the merits and was only seeking an expeditious review." *Id.* The Court then held that the government "did not consent to a judgment against [it], but only that, if there was to be such a judgment, it should be final in form instead of interlocutory, so that [it] might come to this court without further delay." *Id.* (quoting *Thomsen v. Cayser*, 243 U.S. 66, 83 (1917)).

Here, St. Paul sought dismissal of the original complaint only as an expedient to obtaining review of the denial of its motion to amend its complaint. As it admits, its complaint as filed "is no longer factually supportable based upon the newly-discovered evidence." St. Paul, by its request for dismissal, did not agree it was liable but only sought to avoid a trial on the merits of the existing count which otherwise would have been necessary in order to appeal the interlocutory order denying its motion to amend. While other procedures might have been followed, St. Paul's request for dismissal was not "voluntary" in the sense of the general rule that a party may not appeal a judgment to which it consented.

IV

JURISDICTION OF THE COURT OF INTERNATIONAL TRADE

St. Paul advances a number of alternative statutory bases on which jurisdiction could be found in the trial court over St. Paul's-contract

claims, including 28 U.S.C. § 1581(i) (1988).[4] This section provides, in pertinent part, as follows:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section * * * the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States * * * that arises out of any law of the United States [governing import transactions].

Id. St. Paul argues that the new claims could not be brought under 28 U.S.C. § 1581(a), or any other subsection of § 1581, and fall within the parameters of the above subsection. For the following reasons, we conclude the trial court had jurisdiction under section 1581(i).

The trial court determined that, while the new claims fell within the scope of 1581(i), that section could not be invoked because St. Paul could have filed an administrative protest to Customs' demand for payment on St. Paul's bond.[5] Had St. Paul done so, its claims could then have been brought under section 1581(a) and, therefore, per the court, section 1581(i) is not available as a basis for jurisdiction. Because St. Paul filed no protest, the court also concluded that the foundation for bringing a claim under section 1581(a) was lacking and that, therefore, the counts could not be added.

The trial court is clearly correct that section 1581(i) cannot be used to bypass the requirement for administrative protest. The statute plainly states that its jurisdictional grant is "[i]n addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section * * *." 28 U.S.C. § 1581(i). Moreover, if the grant of jurisdiction in section 1581(i) were interpreted to overlap with the grant in section 1581(a), litigants could easily circumvent the jurisdictional scheme of review. To illustrate, a protest must be filed within 90 days of the disputed administrative decision, 19 U.S.C. § 1514(c), whereas a suit under section 1581(i) must be filed within two years of the date a claim accrues. 28 U.S.C. § 2636(h) (1988). Thus, if a suit could be maintained on a protestable decision under both sections 1581(a) and 1581(i), a party could circumvent the time requirements associated with a protestable decision and completely evade the administrative review process. Rejecting this interpretation of section 1581, this court held in *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1041 (1988): "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of section 1581 is or could have

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[4] For instance, St. Paul argues that the new claims are additional grounds in support of the original protest and, that under 28 U.S.C. § 2638 (1988), a separate protest is not required to add these claims to the pending suit. However, we agree with the trial court's conclusion that St. Paul's new claims fail to meet the requirements of section 2638.

St. Paul also asserts jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a) (1988). Under that Act, a federal court may issue orders "in aid of" its jurisdiction. That is, where a court has jurisdiction, it may in appropriate circumstances issue a "writ" to an entity in order to exercise or preserve its jurisdiction. St. Paul did not seek any "writ" from the trial court or, indeed, from this court. Thus, both parties' arguments over whether the All Writs Act can fill in gaps in a court's jurisdiction, as well as the trial court's analysis on this issue, appear off course.

[5] The trial court held that the demand on the bond was protestable as a "charge" within the meaning of 19 U.S.C. § 1514(a)(3).

been available * * *." *Accord National Corn Grower's Ass'n v. Baker*, 840 F.2d 1547, 1556–59 (Fed. Cir. 1988).

There is also no question that a surety may protest the government's demand for payment on its bond provided it files such protest within 90 days of the demand. 19 U.S.C. § 1514(c). Clearly, the alleged facts of St. Paul's new claims do not fit within that administrative scheme. A surety must have some grounds for objecting to the government's demand. In this case, St. Paul alleges it did not know of the now-asserted legal basis for protesting the government demand within the time frame set by the statute for a protest. St. Paul alleges that it became aware of its contract defenses only in 1987 when Customs finally disclosed its long continuing investigation of Opera. If we accept those allegations as true, which we must for purposes of the motion *sub judice*, we cannot agree that the administrative procedures regarding protests must be held to bar the assertion of a later discovered claim.

We note that this is not a case where the government argues suit was brought in the wrong court. Rather, the government argues that St. Paul's claims are barred because it failed to file a timely protest. However, the government admits that if St. Paul had not filed a protest and had refused to comply with the government's demand for payment, and the government had proceeded to sue St. Paul, no protest would have been required to assert contractual defenses against the government's claim. *See United States v. Utex Int'l*, 857 F.2d 1408, 1413–14 (Fed. Cir. 1988). Thus, the-failure of a surety to file a protest against payment on its bond does not in all cases absolve the government of liability.

Moreover, even if no protest to liquidation had been made by Opera, St. Paul's claims would not have been subsumed by liquidation of the entry. The claims are personal to St. Paul and are separate and distinct from Opera's protest. *Id.* The justiciability of St. Paul's claims is not dependent on Opera's protest, nor is it prejudiced by not being part of that protest. One way to clear away the fog is simply to look at the contract claims only – that is, apart from the appeal of Opera's protest. If St. Paul had a right to sue on such contract claims in September of 1988 without a prior protest, it should have been allowed to amend its complaint at that time.

The essence of the new counts is that the government knew that Opera was evading customs laws at the time St. Paul became surety, that the government knew St. Paul did not know the facts, that the government failed to disclose the facts to St. Paul or to obtain the deposit of full duties from Opera, and that, therefore, the government breached contractual obligations to St. Paul. Assuming the basis for St. Paul's charges of government misconduct was not known and could not reasonably have been known by St. Paul prior to discovery in the appealed protest, the claims did not arise until 1987 when St. Paul was informed of the government's investigation. *Chevron U.S.A., Inc. v. United States*, 923 F.2d 830, 834 (Fed. Cir. 1991). Under section 1581(i) a claim must be brought within two years of when the claim first accrues. *Old*

Republic Ins. v. United States, 645 F. Supp. 943, 952 (Ct. Int'l Trade 1986) (citing 28 U.S.C. § 2636(h)). The precedent of this court is well established that a claim does not accrue until the aggrieved party reasonably should have known about the existence of the claim. *Chevron*, 923 F.2d at 834; *accord Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); *Welcker v. United States*, 752 F.2d 1577, 1580–81 (Fed. Cir. 1985); *Braude v. United States*, 585 F.2d 1049, 1051–53 (Ct. Cl. 1978); *Japanese War Notes Claimants Ass'n of the Philippines v. United States*, 373 F.2d 356, 359 (Ct. Cl.), *cert. denied*, 389 U.S. 971 (1967).

Even though we agree with the trial court that the government's demand against a surety bond may constitute a "charge" under section 1514(a)(3) which typically may have to be protested, no protest is required here. No administrative procedure exists to cover the unusual situation where a claim does not accrue until after the protest period has expired. Thus, allowing suit on the new claims does not circumvent the required administrative review process.

Inasmuch as the claims St. Paul seeks to add fall within the scope of section 1581(i), and its claims were not in this case protestable, we conclude that section 1581(i) provides a basis for the trial court's jurisdiction. We express no opinion on the factual issue of when St. Paul knew or should have known of the existence of its claims.

V

CONCLUSION

For the foregoing reasons, the Court of International Trade's dismissal of St. Paul's complaint and denial of St. Paul's motion to amend its complaint are

REVERSED.

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

(Slip Op. 92–33)

NUNN BUSH SHOE CO. AND WEYCO GROUP INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 88–11–00828 (88–11–00829)

(Dated March 13, 1992)

TSOUCALAS, *Judge:* This case having been duly submitted for decision following plaintiffs' motion for summary judgment and defendant's cross-motion for summary judgment, the Court, after due deliberation, having rendered a decision herein; now then, in accordance with said decision,

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment is granted, and it is further

ORDERED that defendant's cross-motion for summary judgment is denied; and it is further

ORDERED that the entries identified on the attached schedule of entries have been liquidated as a matter of law four years after their initial entry at the duty rate asserted at the time of entry. Any excess duties paid shall be refunded with interest in accordance with law from the date of payment. Any interest on the excess duties paid pursuant to 19 U.S.C. § 1677g shall be refunded with interest pursuant to 28 U.S.C. § 2644 from the date of the summons.

NUNN BUSH SHOE CO. *v.* UNITED STATES

Consolidated Court No. 88–11–00828

SCHEDULE OF ENTRIES

Case name	Case No.	Protest No.	Entry No.	Entry date	Liquidation date
Nunn Bush Shoe Co. *v.* United States	88–11–00828	3701–86–000048	81–141483	06/16/81	02/07/86
			81–141494	06/26/81	02/07/86
			81–141497	07/09/81	02/07/86
			81–141503	07/10/81	02/07/86
			81–141524	08/17/81	02/07/86
			81–141526	08/17/81	02/07/86
			81–141528	08/26/81	02/07/86
			81–141529	08/26/81	02/07/86
			81–141530	08/26/81	02/07/86
			81–141533	08/31/81	02/07/86
			81–141534	08/31/81	02/07/86
			81–141541	09/04/81	02/07/86

SCHEDULE OF ENTRIES (continued)

Case name	Case No.	Protest No.	Entry No.	Entry date	Liquidation date
Nunn Bush Shoe Co. *v.* United States (continued)	88–11–00828	3701–86–000048	81–141542	09/09/81	02/07/86
			81–141543	09/09/81	02/07/86
			81–141544	09/09/81	02/07/86
			81–141548	09/14/81	02/07/86
			82–141330	11/23/81	02/07/86
			82–141337	12/04/81	02/07/86
		3901–6–000680	82–603580–6	10/29/81	03/21/86
			82–603691–5	11/13/81	03/21/86
			82–603708–2	11/17/81	03/21/86
			82–603763–9	11/23/81	03/21/86
			82–603819–1	11/30/81	03/21/86
			82–603887–4	12/08/81	03/21/86
			82–604115–9	01/05/82	03/21/86
			82–604424–0	02/17/82	03/21/86
			82–604475–8	02/23/82	03/21/86
			82–604570–2	03/09/82	03/21/86
Weyenberg Shoe Manufacturing Co *v.* United States	88–11–00829	3701–86–000047	81–141470	05/26/81	02/07/86
			81–141476	05/29/81	02/07/86
			81–141491	06/26/81	02/07/86
			81–141492	06/26/81	02/07/86
			81–141493	06/26/81	02/07/86
			81–141498	07/09/81	02/07/86
			81–141499	07/09/81	02/07/86
			81–141512	07/29/81	02/07/86
			81–141525	08/17/81	02/07/86
			81–141531	08/26/81	02/07/86
			81–141545	09/09/81	02/07/86
			81–141323	11/09/81	02/07/86
		3901–6–000679	81–591677–4	06/16/81	03/21/86
			81–591725–2	06/19/81	03/21/86
			82–603860–9	12/04/81	03/21/86

SUMMONS DATE: 11/4/88

(Slip Op. 92–34)

TROPICANA PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–10–00984

ORDER VACATING FINDINGS, CONCLUSIONS AND JUDGMENT

(Dated March 16, 1992)

ORDER

NEWMAN, *Judge*: Pursuant to Rule 59 of this court, on its own initiative this court hereby opens and vacates its decision and judgment in Slip Op. 92–28 of March 9, 1992 for the purpose of deleting certain matters not raised by the parties and deemed by the court unnecessary to the judgment reached. An amended opinion, findings of fact and conclusions of law and judgment of dismissal are entered concurrently with this order.

(Slip Op. 92–35)

TROPICANA PRODUCTS, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–10–00984

AMENDED OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

"MANUFACTURED" IN BONDED WAREHOUSE – 19 U.S.C. § 1562

Tropicana's 17.3° Brix value partially reconstituted orange juice withdrawn from its class 8 bonded warehouse was "manufactured" from imported frozen manufacturing concentrate, as prohibited by 19 U.S.C. § 1562. Hence, the imports were properly assessed duties as "concentrated" under item 165.35, TSUS, their condition as entered for warehouse, rather than as "not concentrated" under item 165.30, TSUS, their condition when withdrawn from warehouse.

[Judgment for defendant.]

(Dated March 16, 1992)

Baker & McKenzie (*William D. Outman, II*, *Thomas Peele* and *Teresa A. Otruba*, Esqs.) for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; and *Steven Berke*, Esq., U.S. Customs Service, of counsel, for defendant.

Barnes, Richardson & Colburn (*Matthew T. McGrath* and *Peter A. Martin*, Esqs.) for *Amicus Curiae* Florida Citrus Mutual.

INTRODUCTION

NEWMAN, *Senior Judge:* Presented for determination is the dutiable status of frozen concentrated orange juice for manufacturing ("manu-

facturing concentrate") imported from Brazil in 1981 by Tropicana Products, Inc. ("Tropicana") and processed in its "Class 8" Customs bonded warehouse.

Tropicana, an importer and domestic producer of orange juice and other citrus products, brings this action pursuant to 19 U.S.C. § 1581(a) to challenge the classification by Customs of five importations of manufacturing concentrate. The merchandise was entered at the port of Tampa, Florida in 1981, and after processing in and withdrawal from Tropicana's bonded warehouse was assessed with duties at the rate of 35 cents per gallon as "concentrated" fruit juices under item 165.35 of the Tariff Schedules of the United States ("TSUS").

The importer insists that in compliance with 28 U.S.C. § 1562 Customs should have classified the imports as "not concentrated" (their condition as withdrawn from bonded warehouse), dutiable under item 165.30 at the lower rate of 20 cents per gallon.

Under 19 U.S.C. § 1562 and implementing regulations (19 C.F.R. § 19.1 *et seq.* (1981)), with Customs' permission, imported goods may be entered in a bonded warehouse and "cleaned, sorted, repacked, or *otherwise changed in condition, but not manufactured*" (emphasis added). If the statute has been complied with, Customs must classify the imports in conformity with their condition as withdrawn from the warehouse rather than in their condition as they arrived in the United States.

On August 7, 1981 the Customs Service promulgated a ruling that Tropicana's bonded warehouse processing of its manufacturing concentrate was a "manufacture for purpose of 19 U.S.C. 1562 and is not a permissible manipulation." C.S.D. 82–24, 82 Cust. Bull. 713 (1982). Tropicana protested the 1987 liquidations under item 165.35, which protests were denied, and this action followed.

The court is called upon to determine *de novo* whether Tropicana's bonded warehouse operations, described *infra*, complied with the statute; hence the factual determinations and legal conclusions in C.S.D. 82–24 are not controlling in this case.

This action was tried before the former Chief Judge, Edward D. Re, in August 1990 in Tampa, Florida and reassigned to the writer on February 7, 1992. As stated above, the court's factual and legal determinations are de novo based on the record before the court. 28 U.S.C. § 2640(a)(1).

For the reasons stated hereinafter, the action is dismissed.

FINDINGS OF FACT

Pursuant to CIT Rule 52, this court finds the following facts:

1. The manufacturing concentrate at issue was produced in Brazil by removing water from natural strength fresh juice extracted from oranges having a Brix value (measure of the concentration of soluble solids) of 11.8°, concentrating the juice to a Brix value of 65°, and then freezing the concentrate.

2. The frozen manufacturing concentrate was shipped to Tropicana in 55 gallon drums. When Tropicana's 65° Brix value manufacturing con-

centrate arrived at the port of entry, Tampa, Florida, its condition was concededly "concentrated" (item 165.35).

3. The imports comprised identifiable lots of manufacturing concentrate with varying chemical characteristics affecting taste, such as Brix to acid ratios (a measure of the sweetness of the juice). The barrels in which the imports were shipped were color coded so that lots of the desired Brix to acid ratios could be selected for blending. Such blending of different lots of manufacturing concentrate having identifiable Brix to acid ratios changed the fundamental character of the imported unblended concentrate.

4. Unblended 65° Brix value manufacturing concentrate is traded in the commodities futures market.

5. Unblended manufacturing concentrate is the basic orange juice raw material, which by blending of lots having different Brix to acid ratios and dilution (with treated water or single strength juice) to reduce the Brix value, several orange juice products are produced for the retail market: 41.8° Brix value frozen concentrated orange juice (from which a retail consumer makes a single strength orange juice by adding three cans of water to the retail package), and 11.8° Brix value orange juice from concentrate (a single strength juice consumed directly from the retail package without further dilution with water). Manufacturing concentrate is also sold for use as soda beverage bases.

6. Tropicana used the imported manufacturing concentrate to produce an 11.8° Brix value orange juice from concentrate for sale at retail in an essentially two phase production process, utilizing a bonded warehouse for the initial phase and unbonded facilities to complete the product for retail sale. The initial phase—processing in the bonded warehouse—is the focus of this case.

7. In the initial, or bonded warehouse, phase (described *infra*), Tropicana produced essentially an intermediate product, a 17.3° Brix value partially reconstituted precursor of the retail 11.8° Brix value orange juice from concentrate product. Thereafter, in Tropicana's unbonded facilities further dilution of the precursor (reduction of the Brix value), addition of ingredients of minor value affecting taste, Pasteurization and chilling completed the 11.8° Brix value orange juice from concentrate product sold at retail.

8. In producing the 17.3° Brix value precursor, Tropicana performed two distinct steps in its bonded warehouse—blending and dilution—which, if not independently, surely in combination, constituted "manufacturing" for purposes of § 1562:

(a) *Blending:* After thawing the frozen imported concentrate to make it processable, Tropicana selected identifiable lots having varying Brix to acid ratios and other chemical composition characteristics for quality controlled blending to create the desired characteristics (flavor, density and sweetness, as measured by an index) of the end or finished product—orange juice from concentrate. When imported, these lots were distinguishable by color coded barrel tops. Typically two to ten lots were

blended. Tropicana's assertion that this quality controlled blending to specification was simple, unsophisticated "mixing" is facetious.

(b) *Dilution:* In the second major phase of the bonded warehouse operations, domestically purchased water that was specially treated and filtered was added to the blended 65° Brix value manufacturing concentrate diluting its concentration to a Brix value of 17.3°, thus producing an intermediate stage partially reconstituted orange juice from concentrate precursor for further processing in Tropicana's unbonded facilities.

9. At the time of the entries in issue (1981), orange juice was classified by Customs under either of two items of the TSUS, dependent upon the Brix value of the imported product: Orange juice having a Brix value 17.32° or less was classifiable as "not concentrated," dutiable under item 165.30; orange juice having a Brix value of more than 17.32° was classified as "concentrated," dutiable under item 165.35.

10. Tropicana's 17.3° Brix value precursor product withdrawn from its bonded warehouse was made to precise specifications and subjected to stringent quality controlled highly automated blending and dilution processes designed to accomplish *two objectives:* (1) duty reduction by conformance with the 17.32° Brix value threshold concentration for classification of the juice as "not concentrated" (item 165.30) when withdrawn from the bonded warehouse; and (2) compatibility of the intermediate 17.3° Brix product in the standard of quality and specifications for subsequent advancement to the 11.8° Brix retail orange juice from concentrate product.

11. Tropicana's bonded warehouse processing effected a fundamental change in the character and use of the imported manufacturing concentrate.

12. The 17.3° Brix value partially reconstituted product of the bonded warehouse was not a standard orange juice product or marketable by Tropicana, but required certain finishing operations. In Tropicana's unbonded facilities, the 17.3° precursor was further diluted with treated water to 11.8° Brix, ingredients of minor value (orange oils, and occasionally pulp and essences for flavoring) were added, the orange juice from concentrate was then Pasteurized, chilled and packaged for sale at retail.

CONCLUSIONS OF LAW AND DISCUSSION

1. Under the tariff provision captioned "Manipulation in warehouse," 19 U.S.C. § 1562, imported "merchandise may [with Customs' permission and supervision] be cleaned, sorted, repacked, or otherwise changed in condition, *but not manufactured*, in bonded warehouses" (emphasis added). A corresponding provision appeared in § 562 of the Tariff Act of 1922.

2. Except for scouring or carbonizing of wool, which § 1562 expressly excludes from the term "manufactured," the latter term was left undefined by Congress. The provisions of § 1562 have been administered by

Customs for some 70 years and the agency has been regularly required to determine on a case by case basis whether a myriad of manipulations performed in bonded warehouses constitute "manufacturing." As used in § 1562 and the corresponding predecessor provision of the 1922 Act, the term "manufactured" has not previously been construed by the courts, and hence this case involves an issue of first impression.

3. Tropicana posits and defendant disputes that the "substantial transformation" test long applied by the courts to country of origin, drawback, Generalized System of Preferences and other tariff provisions should now be applied to construing the term "manufactured" in § 1562. Citing *National Juice Products Association v. United States*, 10 CIT 48, 59, n. 14, 628 F.Supp. 978 (1986), Tropicana argues that its bonded warehouse operations did not result in a "substantial transformation" of the imported merchandise and therefore it did not "manufacture" in its warehouse. Defendant and counsel for *Amicus Curiae* Florida Citrus Mutual, on the other hand, maintain that the "substantial transformation" test applied in *National Juice* for purposes of country-of-origin marking is inapplicable to the term "manufactured" as used in § 1562; and, even if applicable, there was a substantial transformation of the imports in the bonded warehouse. The court agrees, on both counts, with defendant's contentions.

4. "Substantial transformation is a concept of major importance in administering the customs and trade laws. * * *: There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use'." The criteria of name, character and use continue to determine when substantial transformation has occurred * * * ." *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 664 F.Supp. 535 (1987). *See also Torrington Co. v. United States*, 3 CAFC (T) 158, 764 F.2d 1563 (1985); *Belcrest Linens v. United States*, 2 CAFC (T) 105, 741 F.2d 1368 (1984) and cases cited; *Azteca Milling Co. v. United States*, 12 CIT 1153, 703 F.Supp. 949 (1988), *aff'd*, 8 CAFC ___ (T), 890 F.2d 1150 (1989).

5. The substantial transformation test itself may lead to differing results "where differences in statutory language and purpose are pertinent." *National Juice*, 10 CIT at 59, n. 14. There, Judge Restani held that a ruling of the Customs Service that country-of-origin marking requirements apply to frozen concentrated orange juice and reconstituted orange juice that contain imported manufacturing concentrate is not arbitrary or capricious or otherwise not in accordance with the law. In sustaining the challenged Customs ruling before the court in *National Juice*, the court observed that for country-of-origin marking purposes (19 U.S.C. § 1304) Customs had reasonably determined that substantial transformation does not occur in the production of the retail orange juice products from manufacturing concentrate.

"[C]ourts have been reluctant to lay down specific definitions in this area [manufacturing] other than to discuss the particular facts of cases *under the particular tariff provisions involved*." *Belcrest*, 2 CAFC at 109

(emphasis added). Further, in *Rolland Freres, Inc. v. United States*, 23 CCPA 81 (1935), the appellate court held that the dutiable classification of goods may be controlled by a condition which involved manufacturing efforts of so little importance 80 that the result would not be the production of an article as is contemplated by the drawback provisions.

The short of the matter: the criterion of whether goods have been "manufactured" serves different purposes under different statutes, particularly § 1562 on the one hand and statutes concerned with country-of-origin marking, Generalized System of Preferences and drawback on the other; substantial transformation criteria cannot be applied indiscriminantly in the identical manner across the entire spectrum of statutes for which it is necessary to determine whether merchandise has been "manufactured."

6. To interpret "manufacturing" – an expressly prohibited manipulation under § 1562 – as requiring a high threshold of transformation (*viz.*, a substantial transformation as stringently required in country of origin and drawback cases), would negate the evident legislative intent of the statute to permit only very minor or rudimentary manipulations in bonded warehouses – akin to the exemplars (cleaning, sorting and repacking). Hence, in the context of § 1562, the prohibited manipulation, manufacturing, may be contravened at a relatively low threshold of "transformation."

7. Acceptance of Tropicana's broadly expansive construction of a permissible "change in conditions under § 1562, coupled with its restrictive construction of prohibited "manufacturing" as contravened only at a substantial or high threshold of transformation, would make the statute's exemplar rudimentary manipulations (cleaned, sorted, repacked) meaningless.

8. While the term "manufactured" commonly connotes a "transformation" of an import to a "new and different article" (*Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556 (1908)), for purposes of the particular statute here under consideration a low threshold of transformation satisfies the meaning of "manufactured." *Cf. A.N. Deringer, Inc. v. United States*, 40 Cust. Ct. 261, 265, C.D. 1992 (1958). There, horse meat that was merely ground and cooked without addition of any other ingredients (in essence, cooked horse meat) and sold as dog or cat food was held to be "transformed" into a new and distinct article of commerce, and hence "manufactured" for tariff classification purposes. *See also Ferrostall, supra*, wherein the court found that steel sheet (*a material for further manufacture*) acquired new name, character or use by merely hot-dip galvanizing resulting in a "substantial transformation" irrespective of whether the galvanizing altered the "essence" of the steel sheet.

9. For purposes of § 1562, merchandise may be "manufactured" even if transformation results in merely a material for further manufacture. As observed by the appellate court in *United States v. Richter*, 2 Ct. Cust. Appls. 167 (1911): While "[o]rdinarily a manufactured article takes a

different form, or at least subserves a purpose different from the original materials out of which it is made and usually it takes a different name[,] * * * [t]hat does not mean, however, that its usefulness as a material has ended and that as a manufacture it can not serve the purpose of material for some other manufacture."

10. "While to constitute an article a manufacture, it may be necessary to convert the article into an entirely different article, *it is only necessary that the article be so processed that it be removed from its crude or primary state, though it remain a variety of the original material, to be manufactured." United States v. C.J. Tower & Sons*, 44 CCPA 1, C.A.D. 626 (1956) (emphasis added). *See also Chas. H. Demarest, Inc. v. United States*, 44 C.C.P.A. (Customs) 133, C.A.D. 650 (1957); ; *H. Muehlstein & Co., Inc. v. United States*, 44 CCPA 107, C.A.D. 645 (1957); *Kleinberger & Katz v. United States*, 12 Ct. Cust. Appls. 571 (1925); *Meyers v. United States*, 1 Ct. Cust. Appls. 506 (1911). For a comprehensive overview of the long line of cases differentiating between materials "manufactured" and a "manufacture" of a material see Sturm, *Customs Law & Administration*, Vol. 2, § 54.5 (1991).

11. Under § 1562, an intermediate material in process or precursor product resulting from a "transformation" of an imported raw material, although requiring further processing or fabrication to produce a finished article of commerce, may itself be regarded as "manufactured" for purposes of § 1562.

12. The fact that Tropicana's 17.3° Brix partially reconstituted orange juice from concentrate was a nonstandard and unmarketable product and not a "article of commerce," does not preclude "transformation" and thus manufacture of the imported manufacturing concentrate into a new article for purposes of § 1562. In tariff parlance, there is a fundamental differentiation between the terms "manufactured" and "manufactures of." The former describes a processing operation while the latter refers to a completed article of commerce. *B.A. McKenzie & Co. v. United States*, 47 CCPA 42, C.A.D. 726 (1959); *C.J. Tower & Sons*, 44 CCPA at 7; *Chas. H. Demarest, Inc., supra: United States v. Wilkinson Process Rubber Sales Corp.*, 22 CCPA 60 (1934); *Kleinberger & Katz v. United States*, 12 Ct. Cust. Appls. 571, 576 (1925).

13. Tropicana's duty-reduction motivation for its bonded warehouse processing of the manufacturing concentrate is neither proscribed by § 1562 nor any other provision of the tariff laws. In that connection, the court observes the fundamental right of an importer to so fashion his goods as to obtain the lowest possible rate of duty, absent any fraud, deception or artifice concerning the condition of the goods. *United States v. Citroen*, 223 U.S. 407 (1911); *Michaelian & Kohlberg, Inc. v. United States*, 22 CCPA 551 (1935). Moreover, the Customs Regulations explicitly provide: "Manipulation resulting in a change in condition of the merchandise, which will make it subject to a lower rate of duty or free of duty upon withdrawal for consumption, is not precluded by the provisions of such section 562." 19 C.F.R. § 19.11(d).

14. Although under § 1562 the tariff classification of imported merchandise may be changed by permissible manipulations in a Customs bonded warehouse, an importer may not fashion his goods or change their condition in a bonded warehouse to obtain a lower rate of duty by impermissible manipulations. In this case, Tropicana "fashioned its merchandise" in its bonded warehouse by manufacturing, which is expressly prohibited.

15. Under the rule of *ejusdem generis* (where the statute's particular words of description are followed by general terms), the scope of permissible manipulations falling within the language "otherwise changed in condition," must be construed not only with reference to the immediately following qualifying language, "but not manufactured," but also in the context of the common characteristic of the statute's antecedent specific permissible exemplars, "cleaned, sorted, repacked." *See C.J. Tower & Sons*, 44 CCPA at 5–6. The exemplars are, obviously, all very rudimentary forms of manipulation that do not alter the merchandise *per se*. Tropicana's bonded warehouse operations, as described *supra*, are not literally, analogous to or *ejusdem generis* with "cleaned, sorted, repacked," and therefore are not within the scope of "otherwise changed in condition."

16. The court has considered Tropicana's arguments relating to the imports value added, the costs and relative complexity of the warehouse operations *vis a vis* other operations, and capital investment, but is unable to find that any of those factors alter the conclusions reached herein.

CONCLUSION

Based on the record before the court, the particular language and evident purpose of § 1562, Tropicana's 17.3degrees Brix value product was "manufactured" in its Class 8 Customs bonded warehouse for purposes of § 1562, whether or not "substantially transformed" for purposes of country or origin marking, drawback, GSP and other unrelated statutory provisions. The imported merchandise was, therefore, properly assessed with duties at the rate of 35 cents per gallon as concentrated juices under item 165.35, TSUS. The action is dismissed and judgment is entered for defendant.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C92/26 3/11/92 Aquilino, J.	L.B. Int'l	89–7–00435	355.25 12.5%
C92/27 3/12/92 Musgrave, J.	Brother Int'l Corp.	91–1–00029	389.62 Various rates
C92/28 3/12/92 Musgrave, J.	Hartog Foods Int'l Inc.	87–12–01166	152.42 13.1% or 13.8% 152.78 15% 152.88 15%
C92/29 3/12/92 Musgrave, J.	Int'l Nickel Inc.	90–3–00145	2836.99.50 3.7%
C92/30 3/17/92 Aquilino, J.	Int'l Cargo & Surety Ins. Co.	91–5–00348	682.95 5.3%
C92/31 3/19/92 Carman, J.	Defontaine, Inc.	86–8–01001	681.39 or 8485.90. 00008 Various rates
C92/32 3/19/92 Aquilino, J.	E. Gluck Corp.	83–7–01017	716.09–716.45, 715.05, etc. Various rates
C92/33 3/19/92 Goldberg, J.	Inter–Continental	84–11–01633	546.60 30%

	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
	359.60 3.4%	Elbe Products Corp. *v.* U.S., 846 F.2d 743 (Fed. Cir. 1988)	New York Fabrics
	676.5 Various rates	Agreed statement of facts	New York Ribbons mounted on spools
	165.55 3c per gallon of reconstituted juice as prescribed by TSUS Schedule 1, Part 12, Subpart A, headnote 3(a)	Hartog Foods Int'l *v.* U.S. S.O. 91–85 (1991)	New York Apricot, pear and/or peach concentrate
	2620.90.30 Free of duty	Agreed statement of facts	Buffalo Nickel residue
	832.00 Free of duty	Agreed statement of facts	Los Angeles Dry batteries
	680.49 Various rates	Rollix Bearing, Inc. *v.* U.S. S.O. 91–3 (1991)	Milwaukee Geared slewing rings
	688.40, 688.45, 688.43 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz analog watches, etc.
	546.38 12.5%	Agreed statement of facts	Laredo Measuring cups

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	
C92/34 3/19/92 Goldberg, J.	Martin's Herend Imports, Inc.	88–5–00391	5
C92/35 3/19/92 Aquilino, J.	Winer Industries, Inc.	89–1–00042	3
C92/36 3/20/92 Aquilino, J.	Ford New Holland, Inc.	90–10–00536	8
C92/37 3/20/92 Aquilino, J.	E. Gluck Corp.	83–8–01098	7
C92/38 3/20/92 Aquilino, J.	E. Gluck Corp.	83–9–01274	7
C92/39 3/20/92 Aquilino, J.	E. Gluck Corp.	84–3–00307	7
C92/40 3/20/92 Aquilino, J.	Value City Imports	89–5–00265	N

FICATION DECISIONS–Continued

ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
534.87 7%	534.11 or 6913.10.10 3.1%	Agreed statement of facts	New York Porcelain figurines
381.9530 14¢ per lb. + 27.5%	376.5609 7.6%	Pacific Trail Sportswear *v.* U.S., 5 CIT 206 (1983)	Los Angeles Waterproof bib pants
8429.51.10 2%	8701.90.10 Free of duty	Agreed statement of facts	Los Angeles Tractors
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments Inc. *v.* U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz analog watches, etc.
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz analog watches etc.
716.09–716.45, 715.05, etc. Various rates	688.40, 688.45, 688.43, 688.42, etc. Various rates	Belfont Sales Corp. *v.* U.S. 878 F.2d 1413 (Fed. Cir. 1989) or Texas Instruments, Inc. *v.* U.S., 673 F.2d 1375 (Fed. Cir. 1982)	New York Quartz analog watches etc.
Not stated	381.6987 3%	Agreed statement of facts	Cleveland Men's linen sport coats

C92/41 3/23/92 Aquilino, J.	Daewoo Int'l (America) Corp.	90–10–00555S	6202.93 6204. 29.5% (Wom suits) or 62 29.5% (Men suits)

93.5010 or 4.63.3510 % or 30.4% men's track s) 6201.93.3510 203.43.4010 % or 29.7% n's track s)	6211.43.0040 or 6211.43.0050 17% (Women's track suits) 6211.33.0030 or 6211.33.0035 17% (Men's track suits)	Daewoo Int'l (America) Corp. *v.* U.S. 12 CIT 889 (1988)	Los Angeles Women's & men's track suits

Index

Customs Bulletin and Decisions
Vol. 26, No. 16, April 15, 1992

U.S. Customs Service

Treasury Decisions

U.S. Court of Appeals for the Federal Circuit

U.S. Court of International Trade

Slip Opinions

Abstracted Decisions

U.S. G.P.O. 1992–282–776:20080